

REPORTS



OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT

2861 F

OF

THE STATE OF MISSOURI.

SAMUEL A. BENNETT,
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JUDGES OF THE SUPREME COURT OF THE STATE OF
MISSOURI.

HON. HAMILTON R. GAMBLE,

HON. WILLIAM SCOTT,

HON. JOHN F. RYLAND.

THE HISTORY OF THE UNITED STATES OF AMERICA
BY

JOHN F. JOHNSON
AND
JOHN F. JOHNSON
JOHN F. JOHNSON

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF MISSOURI,
OCTOBER TERM, 1853, AT ST. LOUIS.

[CONTINUED FROM VOL. XVIII.]

CITY OF ST. LOUIS, Respondent, *vs.* BOFFINGER, Appellant.

1. The case of the city *v.* McCoy, 18 Mo. Rep. 238, affirmed.

Appeal from St. Louis Criminal Court.

The defendant was convicted and fined for a violation of the quarantine ordinance of the city of St. Louis, which is set out in full in the case of the *City of St. Louis v. McCoy*, 18 Mo. Rep. 239. He appealed to this court.

F. M. Haight, for appellant. The power to regulate commerce is exclusively vested in congress. 9 Wheat. 204. 7 Howard, 283. The transportation of passengers is as much a branch of commerce as the transportation of merchandise. 7 Howard, 405. If this be so, can it be the subject of state or municipal regulation? Congress has regulated the number of passengers a vessel shall take, coming from a foreign port. A more recent act provides for the internal commerce between the states. The power claimed in this case for the city, can-

City of St. Louis v. Boffinger.

not be sustained unless as a police or sanitary regulation. It is evident that it has nothing to do with police. Nor can it be sustained as a sanitary regulation. Whether a law is a sanitary regulation is to be decided by the court, in reference to its aims and objects. It is not for the city council to create the power, by determining the exigency or by declaring what may affect the public health. The exercise of the power must be under such circumstances that the court may see, on the face of the statute, that it is connected with the prevention or mitigation of disease. This cannot be done in this case. It may be assumed that the greater the number of persons confined in a given space, the greater will be the probability of disease among them. But this can furnish no ground for preventive legislation by a municipal corporation. If there is disease, then they may interpose. Again, this ordinance is a tax on commerce. Delay is a tax. 7 Howard, 404.

C. G. Mauro, for respondent.

GAMBLE, Judge, delivered the opinion of the court.

1. Although this case comes entirely within the decision made at the last term of this court, in the case of the *City of St. Louis v. McCoy*, it may be well again to state the principles upon which the decision rests.

Whatever exclusiveness may be claimed for the power to regulate commerce conferred upon congress by the constitution of the United States, it is conceded, that the power exists in the different states to protect their own citizens against the introduction of diseases by the enactment of quarantine laws, although such laws will inevitably interfere to some extent with commerce. It is not necessary, in this place, to refer to the language used by the different judges of the Supreme Court of the United States, in the various cases in which this power to regulate commerce has been considered. It is sufficient to state the result, that the grant of the power to congress does not prohibit the enforcement of such state laws, and the acts

of congress themselves recognize the existence and validity of such state laws.

The only question in the present case is, whether the ordinance of the city is itself a quarantine regulation in its scope and design. If it is, this court will not enter into an examination of the question whether it is the most suitable regulation that could be adopted to protect the health of the city. If its real design is, as a quarantine regulation, to guard against the introduction of disease into the city, we will not undertake to determine whether some other measure, interfering less with commerce, could not as well have accomplished the object. The general assembly has, by the act of incorporation, entrusted the city government with the power "to make regulations to prevent the introduction of contagious diseases into the city; to make quarantine laws for that purpose, and enforce the same within ten miles of the city." In the exercise of this power, the government of the city must have a discretion as wide as that possessed by the government of the state, in choosing between different measures for accomplishing the end. When an ordinance is passed under this grant of power, it is in force by the authority of the state, and is to be interpreted and executed as if it had been passed by the general assembly. Such, at least, is its authority when the question under consideration is, whether it is inconsistent with the constitution of the United States. The ordinance now before the court is an ordinance amendatory of an ordinance entitled an ordinance establishing a permanent quarantine for the city of St. Louis, and the rules and regulations for conducting and enforcing the same. The first section provides as follows: "Section 1. The first section of the ordinance to which this is amendatory, is hereby repealed, and the following shall stand as the first section of said ordinance: Sec. 1. Any steamboat coming from New Orleans, or any point below the city of Memphis, having on board, on her arrival within the quarantine limits, or having had on board at any time during her voyage, a greater number of deck or steerage passengers than twenty for

each hundred tons register of such steamboat, between the first of April and first of November, or a greater number than thirty per hundred tons register at any other season of the year, shall be detained at the quarantine station, for the purpose of cleaning and purification, not less than forty-eight hours, nor more than twenty days, at the discretion of the quarantine officer and the board of health: provided, however, it shall be in the power of the quarantine officer to discriminate in favor of those boats which are constructed without cabins, or with only a few rooms on the upper deck, with a special view to the accommodation of a large number of steerage passengers: and in such cases, if the room thus intended for deck passengers is not occupied with freight, but is reserved for their use exclusively, fifty per cent. more passengers may be allowed than is permitted to boats not thus constructed."

It seems impossible to read this section of the ordinance without perceiving that it is founded on the experience which the city of St. Louis has had of the danger of bringing deck or steerage passengers into the city in crowded boats, particularly during the months of hot weather, and from a southern climate. It assumes that there is danger of contagious diseases being introduced into the city when the boat is crowded beyond a certain measure, whether the disease be developed at the time of approaching the city or not. The mode of determining the number that may be crowded together, without danger of disease, and beyond which the existence of danger is assumed, is by fixing a ratio according to the tonage and construction of the boat. The proportion is changed in different seasons of the year, and the whole of the ordinance applies only to boats coming from the lower Mississippi.

The court does not feel at liberty to express its views in relation to the expediency of the measure, but no doubt is entertained that the ordinance is of that description which, as sanitary measures, remain within the competency of the state government, notwithstanding their incidental interference with commerce. The violation of the ordinance is admitted in the

Gates v. Labeaume.

statement filed, and as the ordinance itself is regarded as valid, the judgment is, with the concurrence of the other judges, affirmed.

GATES, Respondent, *vs.* LABEAUME & THOMPSON, Appellants.

1. A provision in a deed of assignment for the benefit of creditors that the assignees should pay the surplus, if any, after paying all the debts *exclusive of costs*, to the assignor, will not render the assignment void.
2. A deed of assignment under the law of 1845, is *prima facie* evidence that the persons therein named as creditors are in fact such, upon the trial of an issue between the plaintiffs in an attachment and the assignee summoned as garnishee.
3. A deed of assignment for the benefit of creditors is for a valuable consideration in the highest sense of the words.
4. *It would seem* that the fraud of the assignors in a deed of assignment under the statute, (R. C. 1845,) will not render the assignees liable to the process of garnishment on attachment, unless they are parties or privies to the fraud.
5. A deed of assignment valid in its creation will not be vitiated by any subsequent fraudulent or illegal acts of the assignor.
6. To render a deed of assignment fraudulent upon the ground of an intent to hinder or delay creditors, there must be an intent to hinder and delay actually entertained by the debtor; it is not sufficient that such is the effect of the assignment.

Appeal from St. Louis Court of Common Pleas.

The appellants were summoned in an attachment suit as the garnishees of one Claverdetscher. The plaintiff filed allegations stating that the garnishees had in their hands goods and chattels belonging to and delivered to them by Claverdetscher; also that they were indebted to Claverdetscher.

The garnishees answered, admitting that they were assignees of Claverdetscher and had taken his goods assigned, and disposed of them according to the deed under the order of the Circuit Court, having first made an inventory and appraisal, and that they held the proceeds. They filed a copy of the deed

with their answer. It is in the common form of an assignment for creditors, among whom Gates, the plaintiff, is named in the deed. They deny having any effects of Claverdetscher, except under said assignment.

The plaintiff filed a traverse, stating that said deed of assignment was a fraudulent contrivance on the part of Claverdetscher to delay and defeat his creditors, and that one of the garnishees was privy to the fraud.

The case was tried by the court in the absence of the garnishees, and the court gave judgment for the plaintiff, reciting that the garnishees *were indebted to Claverdetscher*.

The decision in writing states that the assignment was made to defraud creditors; that only a part of Claverdetscher's goods were assigned, and the residue were about to be fraudulently removed; that there was no evidence that the preferred creditors named in the assignment were real creditors of Claverdetscher.

The garnishees moved for a review, and made a case which contained all the evidence adduced by the plaintiff on trial. The evidence was the deed of assignment which appeared to have been duly executed and recorded; and testimony to the effect that the assignment was made pending judgments against Claverdetscher, and very soon after Claverdetscher's agent, one of the assignees, had assured one of the judgment creditors that Claverdetscher was solvent and that he would be paid; also that just after the assignment Claverdetscher's wife secretly shipped some of his goods to be carried to Cincinnati.

The points made on the case were these: 1. There was no charge of fraud in the allegations, and the evidence in that respect was immaterial. 2. The assignment was not in fact fraudulent. 3. There was no notice of any fraud to the garnishees. 4. The assignment was valid. 5. The deed of assignment was evidence that the persons therein named as creditors were creditors.

The court below denied the motion for review. The garnishees appealed.

R. M. Field, for appellants. I. Under the circumstances relied on by the plaintiff, the appellants were not liable to the process of garnishment. In *Van Winkle v. McKee*, 7 Mo. Rep. 435, it was held that an assignee, for the benefit of creditors, could not be holden as a garnishee on execution, because he was not a debtor, and for the further reason that it would be highly inconvenient to settle the rights to the fund in such proceeding. In *Lee v. Tabor*, 8 Mo. 322, which was an attachment case, the court said that the case was certainly embraced by the reasoning of the court in *Van Winkle v. McKee*, but in deference to the legislature, which, in respect to attachments, had used language too explicit to admit of construction, the proceeding by garnishment was allowed. This was in 1843. Since this last case arose, important changes on the subject have been made in the statute law. 1. The legislature has passed an act regulating the proceedings under assignments. The assignee is required to give bond, file inventories, act under the orders of the circuit court and render his account to the same court. This statute brings the assignee within the reason of the decisions of this court, exempting sheriffs and administrators, from the process of garnishment. *Marvin v. Hawley*, 9 Mo. Rep. 382. *Curling v. Hyde*, 10 Mo. Rep. 374. 2. In 1847 the legislature passed an act reducing the proceeding of garnishment on attachments to the level of that on executions. Acts of 1847, p. 9. §3 provides that "where a plaintiff shall file his interrogatories to the garnishee, he shall also file a plain and distinct statement of the grounds on which he requires the garnishee to answer, and the garnishee may then *plead and defend as he might do, if he was sued for the same cause by the defendant in the action.*"

The matter appearing on the answer and evidence in this case was, undoubtedly, a perfect defence to any claim by Claverdetscher, the defendant; and by force of the statute just quoted, it was equally as good a defence against the plaintiff. II. The allegations in this case were an evasion of

the act of 1847. No fraud in the assignment was alleged. A replication was resorted to to bring out the grounds of the plaintiff's claim. The attachment act of 1845, § 32, authorizes a *denial* of the garnishee's answer. But in the present case there was no denial. The plaintiff confessed the answer and undertook to avoid it by new matter. The new matter thus improperly brought before the court ought to have been disregarded on the trial. III. There was no competent evidence of any fraud on the part of Claverdetscher in making the assignment. The only evidence relied on was to the effect that his wife had secretly disposed of some goods included in the assignment and at a time subsequent to the assignment. The transactions were not proved to have any connection. IV. Even if Claverdetscher were chargeable with fraud in the assignment, no privity or notice is imputable to the assignees. It is conceived that without such privity or notice the assignees were not chargeable. V. The deed of assignment was competent, and, in the absence of other testimony, sufficient evidence that the persons named in the deed as creditors were creditors in fact. The other side seems to rely on two cases in 5 Mo., *Hughes v. Ellison*, 463, and *Crow v. Ruby*, 485. These cases do not seem to have been well considered by the court, and they were disapproved of by Judge Napton, in *Brown v. Knox*, 6 Mo. 302. At all events it is conceived that they have ceased to be applicable, since our statute law of assignments has required all creditors to prove their debts before they can claim any benefit under the assignment.

Knox & Kellogg, for respondent. 1. The deed is fraudulent on the face of it. It provides, that no costs that may be incurred in prosecuting demands against Claverdetscher, shall be paid by said assignees, and provides for the payment of any surplus, after satisfying all the claims specified in the deed, exclusive of costs. If this clause does not wholly vitiate the deed, it is evidence of a fraudulent intent. 2. There was no evidence offered tending to prove that the persons named in the first class of preferred creditors, had any *bona fide* demands

against said Claverdetscher, or that he was in any wise indebted to them, nor was there any evidence tending to prove the assent of any of the creditors to said assignment. 5 Mo. Rep. 241. 5 ib. 463. 5 ib. 489. 17 Mass. 454. 13 Mass. 146. 3. There is positive evidence that the deed of assignment was made for the purpose of defrauding creditors. While the deed professes to convey and assign all the assignee's property, the evidence shows that the assignor, subsequent to the assignment, endeavored to remove a portion of the goods out of the state of Missouri, and this, too, with the knowledge of the assignee, Thompson. Burrell on Assignments, 391-2, 384, 168-9, 170,-1-2-3-9, 235. 2 Comst. 365.

RYLAND, Judge, delivered the opinion of the court.

It becomes necessary for this court to consider but the two main questions arising in this case. Is the deed of assignment from Claverdetscher to Labeaume & Thompson void on its face? If not, do the facts in proof render it void? We shall not say any thing in regard to the right of the plaintiff to garnishee the assignees. We shall not say in what light such assignees are to be considered; whether as *quasi* public officers, against whom the process of garnishment cannot be maintained or not. Taking all such steps as lawfully done in this case, we shall notice the two main questions above.

1. First, is the deed of assignment upon its face void? This we answer in the negative. There is no provision in it which, in our opinion, renders it void. The deed is in the usual form; it has its preferred creditors, or rather, classes, requiring the debts of the first class to be first paid, and so on. Said deed of assignment is as follows:

"This indenture, made this tenth day of February, in the year of our Lord, one thousand eight hundred and fifty-two, between Lucien Claverdetscher, of the first part, and W. Broadus Thompson and Theodore Labeaume of the second part, all of the city and county of St. Louis, and state of

Missouri: Whereas, the said party of the first part, is indebted to various persons, whose names are hereinafter mentioned, with the amount due each attached to the same; and, whereas, he is unable to provide money promptly and at maturity for all his obligations and indebtedness, but is desirous of applying thereto all his property of every kind and description: Now, therefore, this indenture witnesseth, that said party of the first part, for and in consideration of the premises, and of the sum of one dollar unto him in hand paid by the said parties of the second part, at or before the sealing and delivering of these presents, the receipt whereof is hereby acknowledged, has granted, bargained and sold, assigned, transferred and set over, and does hereby grant, bargain and sell, assign, transfer and set over to the said parties of the second part, all the property of the said party of the first part, of every kind and description, consisting of goods, wares and merchandise, books, notes and accounts, contained in the store house now occupied by the party of the first part, in Glasgow Row, now No. 122, on Fourth street, in the city of St. Louis, in the state of Missouri.

“To have and to hold the said property to the said parties of the second part, in trust for the following uses and purposes hereinafter directed, and none other, that is to say, the parties of the second part shall take possession of the said goods, wares and merchandise, and dispose of the same according to law, and shall also collect all said notes and accounts due said party of the first part, (all of which is to be done under the provisions of the act of assembly, in such cases made and provided,) and out of the proceeds of such sales and collections, they shall pay, first, the expenses of drawing and executing this instrument, and of carrying out the purposes of this trust.

“Secondly, they shall pay and discharge a debt of two thousand five hundred dollars (\$2,500) with six per cent. from the 17th day of July, 1849, due Christian Burkhardt, of Cincinnati, Ohio, by note of party of first part, of 17th July, 1849, for money loaned.

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“Also a debt of seven hundred and fifty dollars, with six per cent. from 18th July, 1851, due to John Akley, of St. Louis, by note of party of first part, dated 18th July, 1851, for money loaned; and also a debt of three hundred dollars to Miss Mary Webb, which party of first part owes her for services as saleswoman in his store.

“And after said parties of the second part shall have paid and discharged the above recited debts in full, they shall proceed, thirdly, to pay the following debts in the city of Baltimore, in the state of Maryland, to-wit: To Langston & Co., \$611 54; to Benjamin Crane, \$491 40; to Lewis & Drost, \$778 93; to Spikes & Pricht, \$974 76; to Dundalet & Co., \$469 69; to T. Twist, \$309 88; to Yeakle & Cobb, \$478 35; to T. Bowley, \$819 79; to Ezra Gates, \$197 17; to N. Ward, \$102 16; to James Stodges & Bro., \$1289 64, with such interest as may be due thereon, but no costs that have accrued or that may accrue upon any of them by suit.

“And also the following persons of Philadelphia, Pennsylvania, the following debts, to-wit: To F. Dutching, \$434 66; to Yard & Tideware, \$997; to Kemple & Ringle, \$771 40; to W. Morris, \$1009 74; to S. J. Levy, \$666 90; to Jules Haue, \$189 07; to H. M. Hartsman, \$102 48; and to H. Bazon, \$91, with all interest that may be due on the same.

“And also the following debts in the city of New York, viz: To M. Huza, \$195 75; to Martellis & Halderman, \$182; to M. Lawson, \$746 26; to Baldwin & Bliss, \$279 87; to Edward May, \$330; to Lowitz & Becker, \$483 37; to Devismes & Dumaulies, \$164 68; to P. F. Lewis & Bro., \$400; to Rehne Beno, \$292 50; to P. Murray, \$326 22; to Mayer & Meister, \$460 75; to Ward & Dickson, \$426 29; to Feidenlenner, \$417 13; to David Morrison, \$175 09, with all interest that may be due upon them. If there should not be sufficient means to pay all these of the third class, in full, then the amount remaining after paying the second class, shall be distributed and paid, pro rata, to the debts of this third class. If, however, there should be

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sufficient means to pay all the debts of this third class and a balance should remain, then the said parties shall apply such balance to the payment, fourthly, of the following debts, viz: To G. Moss, of New York, \$213 50; to A. F. Jarvis, of New York, \$213 00; to S. R. Towbridge, of New York, \$587 37; to Modan Matherba, of New York, \$148; to F. Rees & Bro., of New York, \$175 73; to Charles L. Noe, of New York, \$123; to Abluro, of New York, \$202 62½; to Campbell & Rockman, of New York, \$251 55; to Joseph B. Smith, of New York, \$744 54; to T. Bowles, of New York, \$517; and to Rogers & Walker, of New York, \$1284 44.

“If, after paying the first, second and third class of debts and obligations, as heretofore enumerated and directed, the balance of means should not be sufficient to discharge in full the debts enumerated in this fourth class, then such balance shall be distributed, pro rata, among them. If, however, there should be enough to pay all, and a surplus remains, such surplus shall be paid over to the party of the first part, his heirs, executors, administrators and assigns.

“It being nevertheless understood and agreed, any thing hereinbefore contained to the contrary notwithstanding, that said parties of the second part shall be authorized and empowered to reserve and retain to their own use, out of any moneys belonging to said estate, or arising from said sales and collections, compensation for their services, over and above the expenses of five per cent. for receiving and paying out all sums of money.

“In testimony whereof, the said parties have hereto set their hands and affixed their seals, the day and year first herein written.

“W. BROADUS THOMPSON, (seal.)

“THEODORE LABEAUME, (seal.)

“L. CLAVERDETSCHER,” (seal.)

The only possible objection which could be urged against this deed is the provision requiring the assignees to pay no costs on the debts that have accrued, or that may accrue on

them by suit. This provision extends to the debts named first in the third class, being due in the city of Baltimore. These debts, with interest due, to be paid, but no costs. We cannot satisfy ourselves that this provision vitiates this deed of assignment. A man may prefer his creditors. This principle of preferring one creditor or one set of creditors to another, is too well settled at this day for a serious doubt of its legality to be entertained. Now this provision is to save the property thus assigned from useless costs. Men may sue if they will, and may get from their assignees all the principal and interest, but not the costs. This does not render the deed void, and upon its face there is no other objection of any serious weight.

2. Do the facts in proof make this deed void as to the assignees and creditors of Claverdetscher? We consider these facts do not; that the deed is not void on its face, nor does the testimony in this case make it void in fact. The evidence consisted of this deed of assignment, and also of some evidence "tending to show that, at and before the date of said assignment, Claverdetscher had a store in St. Louis, which was carried on by his wife; that he was largely indebted and insolvent; that his creditors were pressing for payment, and some of them had obtained judgment; that his agent, one of the assignees, promised payment and good assurances of Claverdetscher's ability to pay; that some of the creditors were induced by said agent to refrain from issuing execution from time to time, and that while said creditors were thus waiting, the deed of assignment was drawn up, executed, acknowledged and recorded, without the knowledge of said creditors, and that after said assignment, his wife, with his privity, secretly shipped at St. Louis a quantity of merchandise belonging to him, to be carried to Cincinnati, without this state." This is all the evidence to bring home fraud to the assignees. In looking over the case carefully, I find that the court below found that there was no evidence offered to show that the persons named in the deed of assignment as creditors were in

reality creditors. This omission or this lack of proof might have induced the court to come to the conclusion that the deed of assignment was fraudulent and made to hinder and delay creditors. But the deed of assignment itself is *prima facie* proof of such debts, is *prima facie* proof of such creditors, and there was no necessity for proving on the trial that such persons therein named were creditors. The lack of such proof then should have had no weight in inducing the finding of the court. There is no evidence bringing home to the assignees any notice of any design or contrivance or trick of Claverdetscher to defraud his creditors, or to hinder and delay them in the collection of their debts.

Our statute makes provision for such assignments ; it requires an inventory to be filed with the clerk of the circuit court ; requires the assignee to give bond requiring him faithfully to discharge the trust. The assignee is required to give notice in some newspaper of the time and place of adjusting demands against the estate of the assignor, and the assignee is authorized to require such proof of the justice of the demand against the estate, as is required to prove similar demands in the circuit court in suits between the original parties to the contract. Under this statute, the circuit court can dismiss the assignee and can appoint another. Before, then, any demand can be allowed against the estate of the assignor, proof can be required by the assignees. Therefore, there is now no necessity for proving that the persons named as creditors are really so ; they get nothing if they are not ; they must prove their demands by evidence, satisfying the assignee of their justice, before he allows the same, notwithstanding they have been named in the deed of assignment. But on the trial of the fraudulent nature of the deed or not, such proof is not required.

3. There can be no question whether an assignment of a debtor's property to a trustee for the benefit of his creditors is for a valuable consideration or not, because the debts due to the creditors constitute a valuable consideration, in the highest

sense of the terms ; and the obligation of the trustee to perform the trust according to the provisions of the deed, is a sufficient valuable consideration for him, so far as he is concerned. Burrell on Assignments, 219. This is peculiarly so in our state, under the statute of assignments. In New York, the consideration of one dollar, merely nominal, or the fact that the assignee was a creditor, as appears on the face of the assignment, is sufficient to transfer the legal title to the property and vest it in him. The amount of consideration was never material for this purpose, and it seems to be well settled that the relation of debtor and creditor between the parties, and the legal consequences of the assignment, constitute a sufficient consideration as between them. In the case of *Lawrence v. Davis*, 3 McLean, 177, Justice McLean said that an assignment for the benefit of creditors cannot be considered void for want of consideration.

4. There is no evidence on the record showing any act done by the assignees as indicative of fraud on their part ; no notice of any evil or wrongful purpose between the assignor and his assignees ; nor will the fact that one of the persons who was afterwards made assignee, having made remarks that Claverdetscher was able to pay his debts and would pay his debts, have any tendency to show that this assignment was fraudulent. The act of Claverdetscher's wife secretly shipping some of his goods to Cincinnati, after the assignment, cannot have the effect of rendering this assignment void. There is a total failure in proof, requisite to bring knowledge of this act of Mrs. Claverdetscher to the assignees, much less to implicate them with her in the act.

5. It is a principle that the character of the assignment will not be affected by subsequent events, and if valid in its creation, no subsequent fraudulent or illegal acts of the parties can invalidate it. Burrell on Assignments, 401. In *Browning v. Hart*, 6 Barb. S. C. Rep. 95, Page, P. J., said, in delivering the opinion of the court, "a fraudulent intent, entertained subsequent to the execution and delivery of the assign-

ment, will not invalidate it." Here, then, apply this rule to the act of Claverdetscher and his wife, in secretly endeavoring to remove part of his property to Cincinnati, and it will be seen that such act cannot render void the assignment. Again, it does not appear that the property sought to be thus secretly removed by the wife, was a part of that which had been assigned. The assignment is for the property in the store on Fourth street, in Glasgow Row; the property which she is charged with secretly trying to remove, may be or may not be a part of this store property. In the same case of *Browning v. Hart*, above cited from 6 Barb., it was held, that an assignment executed by a person in embarrassed or insolvent circumstances of his property, in trust for the benefit of his creditors, is valid, if it unconditionally and absolutely devotes the whole of the assigned property to the payment of his debts, provided it be made without any intent to hinder or defraud his creditors.

In this case, then, the facts do not connect the assignees with any act or intention of Claverdetscher to hinder, delay or defraud his creditors; nor is there proof of any knowledge on their part, of such intention or design on the part of Claverdetscher. The assignees were discharging their trust under the order of the Circuit Court. The conveyance to them is binding and efficacious; it transfers to them the property; it becomes vested in them for the benefit of persons who are not to be affected by any act of Claverdetscher, without their knowledge. See *Knox v. Hunt & Labeaume*, 17 Mo. Rep. 174.

6. Lord Mansfield said in *Cadogan v. Kennett*, Cowper, 434, "The question in every case is, whether the act done is a *bona fide* transaction, or whether it is a trick and contrivance to defeat creditors." It has been decided in New York that an assignment authorizing the assignee to sell the property assigned on credit is void for that very reason. This doctrine is not in accordance with the views of this court upon this subject; nor does this court approve the practice of the New York courts in their zeal to declare deeds of as-

signment and other conveyances fraudulent and void *per se*. These matters, in most cases, had better be tried by juries, and facts had always better be made to appear in such cases. Still we will not say that the courts cannot or should not declare those deeds in which provisions are contained obviously repugnant to the law of the land, void *per se*.

A deed may delay creditors and not be void, where such delay is not its principal object. 13 Smedes & Marsh. 22. Every conveyance of property by an insolvent or embarrassed man, to the exclusive satisfaction of the claims of some of his creditors, has necessarily a tendency to defeat or hinder his other creditors in the collection of their demands. But if the sole purpose of such a conveyance be the discharge of an honest debt, it does not fall under the operation of the statute of fraudulent conveyances. Iredell's Law, 490. Lord Ellenborough said, in the case of *Meux v. Howell*, 4 East. 13: "It is not every feoffment, judgment, &c., which will have the effect of delaying or hindering creditors of their debts, &c., that is therefore fraudulent within the statute; for such is the effect *pro tanto* of every assignment that can be made by one who has creditors. But the feoffment, judgment, &c., must be devised of malice, fraud or the like, to bring it within the statute. Every assignment of a man's property, however good and honest the consideration, must diminish the fund out of which satisfaction is to be made to his creditors. In order, then, to bring an assignment by a debtor within the statute of fraudulent conveyances, on the ground of an intent to hinder and delay creditors, there must be an intent to hinder and delay actually entertained by the debtor. Burrill on Assignments, 382. This is the rule of construction adopted in many cases, and it meets with the approbation of this court; though in some of the states of this Union a different rule of construction prevails.

By our statute of assignments, the circuit court or circuit judge, may direct the assignee to sell for cash in hand or on credit, as shall appear for the interest of all concerned, &c.

Beck v. Ferrara.

Upon the whole case, this court is of opinion that the judgment of the court below is erroneous ; that the finding of the court below was improper and should have been for the assignees, the garnishees, and this court, therefore, reverses the judgment of the court below, and proceeds to render such judgment as the court below ought to have given in the premises, and accordingly judgment will be rendered here in favor of the garnishees. The other judges concur.

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BECK, Defendant in Error, *vs.* Ferrara, Plaintiff in Error.

1. The petition stated that the defendant was indebted to the plaintiff for stall No. 20 in the North Market, which was purchased by the plaintiff from a third party for defendant at his special instance and request. The proof was that the plaintiff bought the stall for himself, and afterwards sold it to the defendant. *Held*, this was an entire failure of proof of the cause of action alleged in the petition, (within the meaning of section 3 of art. 11 of the new code of practice,) and not a mere variance.

Error to St. Louis Court of Common Pleas.

Bay and Gardner, for plaintiff in error. The court below erred in permitting evidence of the sale of the stall by Beck to Ferrara to go to the jury. No such issue was made by the pleadings. *Link v. Vaughn*, 17 Mo. Rep.

H. N. Hart, for defendant in error. If there was any variance between the pleadings and the proof, it was not a material one under the new practice.

RYLAND, Judge, delivered the opinion of the court.

1. The only question of importance for the consideration of this court is in relation to the third item of the plaintiff's account; that is for the stall in the North Market. The petition charges as follows, after stating the first item for board and the second for hire of a horse and wagon, &c., "and for

a certain stall in the North Market House, known as stall No. 20, which said stall No. 20 was purchased by said John Beck from one Hargens for the sum of five hundred dollars, for him, the said defendant, and at his special instance and request; and which said sum of five hundred dollars, the price of said stall, paid by said John Beck, as aforesaid, he, the said defendant, promised to pay said John Beck, but which he has failed to do." The account of the particulars filed has three items, the third as follows: "To stall No. 20 in the North Market, purchased by John Beck, deceased, for you and at your request, from one Hargens, and for which said Beck paid five hundred dollars, and which you promised to pay. \$500."

The defendant, in his answer, denies that Beck ever purchased from one Hargens a stall in the North Market House, as stall No. 20, for the sum of five hundred dollars, or any other sum, for him, the said defendant, and at his instance and request; denies that he ever requested said Beck to buy said stall for him, and denies that he ever promised to pay said Beck the sum of five hundred dollars or any other sum for said stall."

The proof shows that Beck bought the stall mentioned in the petition from Hargens for himself, and afterwards he sold the same to Ferrara. There is a total failure in the proof to sustain the charge and allegation in relation to the stall, as made and set forth in the petition. Section 3, art. 11, code of practice, declares that, where however, the allegation of the cause of action or defence to which the proof is directed, is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, within the last two sections, but a failure of proof." Here the petition avers that Beck, at the special instance and request of Ferrara, bought a stall for him in the North Market House, of one Hargens; stall No. 20, for the sum of five hundred dollars, which he promised to pay to Beck. Now, suppose, instead of proving the number of the stall to be 20, or the name of the person purchased of to be Hargens, or the mar-

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ket house to be the North Market, the plaintiff had offered proof of the purchase of a stall for the defendant in some other market house, of some other person, but for the sum of five hundred dollars, and at the special request of the defendant; here would be a variance in some particulars from the allegation, but not in its entire scope and meaning; this would be such a variance as is contemplated in the first and second sections of the same article. But, in this case, the entire allegation is unproved; there is no proof that a stall in any market house, for any sum, of any person, was ever purchased by Beck for the defendant at his special instance and request; but the proof is, that Beck sold a stall to the defendant. This case is very similar to the one decided by this court at the last term, *Link v. Vaughn*, from Franklin county, and to the opinion therein delivered reference is had.

In regard to amendments, it is thought proper to suggest, that the proper place and time to ask for them is in the court below, during the trial or before final judgment. If counsel will not amend, when amendments are necessary, in order to reach the merits of the case in the lower courts, this court will not incline a propitious ear to such applications, when made here for the first time in the cause.

The judgment of the court below is reversed, and the cause remanded, the other judges concurring.

RAYMOND & KENDALL, Respondents, *vs.* EDGAR & WALSH,
Appellants.

1. Case not properly saved.

Lewis & Henning, for appellants.

A. P. & P. B. Garesché, for respondents.

GAMBLE, Judge. In this case the trial of the facts was by the court, and the court makes its decision finding the facts. There was no motion to review any question of law or fact

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arising on the trial and determined by the court, but there was a motion in the form of the old motion for a new trial, for the reasons that the finding was contrary to law and against evidence. The record presents no case saved according to the code, and the judgment is affirmed.

FINE *et al.*, Plaintiffs in Error, *vs.* GRAY, Defendant in Error.

1. Where the plaintiff in an ejectment suit dies, the suit may be revived in the name of his heirs or devisees.
2. Although under the new practice a party may be substituted *on motion*, yet it can only be on the voluntary appearance of the adverse original party, or after the service upon such party of a *scire facias*.
3. The provision in the revised code of 1845, that a *scire facias* for the substitution of a plaintiff in the place of the original, must be sued out before the expiration of the third day of the second term next after the term at which the death or disability of the original party shall be stated upon the record, is still in force.

Error to St. Louis Court of Common Pleas.

This was an action in the nature of ejectment, begun by Elisha Fine against Thomas Gray, on the 12th of November, 1850, in the St. Louis Court of Common Pleas. After issue joined, the plaintiff died, and his death was suggested at the September term, 1852, of said court, and the suit continued. At the February term, and on the 24th of March, 1853, Joshua Fine and others, to whom Elisha Fine devised the land in controversy, filed their motion to have the suit revived in their names. No *scire facias* was served on the defendant, nor did he appear. The motion was overruled and a writ of error sued out to this court.

Krum & Harding, for plaintiffs in error. This action is within the meaning of the 9th section, article 3 of the act of 1849, and did not abate by the death of the original plaintiff, but may be continued in the name of his devisees. The Su-

preme Court of New York has given a similar construction to a statute substantially like our's. 4 Howard's Prac. Rep. 358. The same rule existed as the law of practice stood before 1849, and an action of ejectment did not abate by reason of the plaintiff's death. R. C. 1845, sec. 4, art. 5. That the suit may be revived by *motion*, the statute itself provides. Act of 1849, art. 3, sec. 9.

J. A. Kasson, for defendant in error. Where the action of ejectment is brought, as in this state, in the name of a real plaintiff, and not of a fictitious lessee, the main action, that is for possession, must abate. This is not a claim on the part of an executor or administrator to come in and prosecute for the *damages*; but of devisees of the title to recover possession. By the common law, the action abated on the death of the plaintiff. Tillinghast's Adams, 81. *Howard's lessee v. Gardiner*, 3 Harr. & McH. 98. *James v. Bennett*, 10 Wend. 540. In ejectment, the plaintiffs must show title in themselves before the ouster laid in the declaration. *Buxton v. Carter*, 11 Mo. Rep. 481. But these plaintiffs had no title prior to the ouster charged in the petition. Hence they could not recover *for the same cause of action*. They must allege an ouster subsequent to the commencement of the suit, which would be an anomaly in practice and an absurdity in law. The claim of survivorship is inconsistent with our special statute upon "Ejectment," which remains in force. R. C. 1845, §6, 10, 11, 14. The new code (art. 3, §9,) does not vary the former statutes in respect to the point before the court. It only applies, *if the cause of action survives or continues*. The case cited from 4 How. Prac. Rep. merely shows that by the special statute of New York, the action was made to survive. There the question was also raised upon the death of the defendant.

SCOTT, Judge, delivered the opinion of the court.

1. The question presented by this record is, whether if the plaintiff in an action in the nature of ejectment dies, the suit

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can be revived in the name of the heirs or devisees? The action of ejectment has been the only form of mixed or real action in which the title to lands has been tried in this state. The 4th section of the 5th article, Revised Code 1845, which is but a copy of a former law, enacts that, when there is but one plaintiff in an action, and he shall die before final judgment, such action shall not thereby be abated, if it might be originally prosecuted by the heirs, devisees, executors or administrators of such plaintiff; but such of them as might prosecute the same cause of action originally, may continue such suit upon the order of the court substituting them as plaintiffs therein.

The 9th section of the 3d article of the act of 1849, declares that no action shall abate by death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survives or continues. This provision, it is conceived, does not in any wise affect the former one. If the cause of action survives or continues, it may be revived. The provision in the New York code is the same as ours, and under it the courts have held, that actions in the nature of ejectment may be continued against the heirs of the defendant, upon his death, they claiming to have succeeded to his rights. *Waldorph v. Bortle*, 4 How. 358.

2. There is no doubt that a party may be substituted on motion, but it must be on the voluntary appearance of the adverse original party, or after the service upon such party of a *scire facias*. Art. 5, sec. 16, R. C. 1845. The code is silent as to notice to the adverse party in making orders for the revival of suits. In the absence of such a provision, we must take the old law still to be the rule. Indeed, if the former law was looked upon as repealed, yet it would be against the first principles of justice to permit one party, without the consent or notice to the other party, to take a step in a cause which might defeat his adversary's action. The opposite party has a right to be heard on the motion. He may contest the fact on which it is founded, and without his consent, which is signified by his

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voluntary appearance of record or notice to him, the court has no authority to take a step which may prove fatal to his rights.

3. The 18th section of the 5th article of the revised code of 1845 enacts, no *scire facias*, for the purpose of substituting a person as plaintiff or defendant in any suit, in the place of the original, shall be sued out after the expiration of the third day of the second term next after the term in which the death or disability of the original party shall be stated upon the record. This provision is considered as still in force, and as the motion for a revival was not made within the time within which a *scire facias* might issue, and as the opposite party did not consent, the motion for the revival in the names of the devisees was properly overruled. With the concurrence of the other judges, the judgment will be affirmed.

BIDAULT *et al.*, Respondents, *vs.* WALES, Appellant.

1. A party who purchases goods on credit, knowing at the time his insolvency and inability to pay for them, but without a preconceived design not to pay, is not guilty of such fraud as will avoid the sale.

Appeal from St. Louis Circuit Court.

Knox & Kellogg, for appellant. After a sale and delivery of merchandise, the vendor cannot recover the goods for the reason that the vendee was insolvent at the time he made the purchase, and then knew himself to be so. Story on Sales, §446. *Cross v. Peters*, 1 Greenl. 376. 2 Mason's Rep. 236. 6 Wend. 77. 12 Pick. 307.

A. Buckner, for respondents, cited Story on Sales, §176. *Ro&ley v. Bigelow*, 12 Pick. 312.

SCOTT, Judge, delivered the opinion of the court.

Bidault & Co. stated, in their petition, that they sold at New Orleans to A. W. Whiting, of whom the defendants are con-

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signees, sixteen hogsheads of sugar, to be paid for ten days after the sale ; that Whiting failed to pay at the time agreed upon ; that when the sale took place, Whiting was insolvent and wholly unable to pay for the sugar ; that his inability and insolvency were then well known to him, and that he was then unable to comply with his promise ; that for the causes and reasons aforesaid, Whiting procured the possession of said sixteen hogsheads of sugar by false pretences and fraudulent practices and acts. On a trial, there was a judgment for the plaintiffs.

1. From the face of the petition, it appears that the only fraud and deceit practiced by Whiting, was the purchasing of the sugar, knowing his insolvency and inability to pay for it ; for the fraud and fraudulent practices charged, are only stated as a conclusion from the fact that Whiting knew of his insolvency and inability to pay, at the time of the sale ; so the case raises the question, whether, if one knowing his insolvency and inability to pay, purchases merchandise at ten days' credit, for which he afterwards fails to pay, is guilty of such deceit as will avoid the sale.

This case steers clear of the question, as to the vendor's right of stoppage in transitu in the event of the insolvency of the vendee, before an actual or constructive possession by him of the merchandise sold. Here the sale was consummated by the delivery of the subject matter of it. No case has been found, in which it is maintained that the insolvency of the purchaser, though known to himself and unknown to his vendor, would avoid the sale. The law, as stated by Wm. Story, in his work on sales, §146, is not supported by the case to which he refers, and afterwards, in the same work, §446, he says, that the mere fact of the insolvency of the vendee, and his liability to immediate attachment, though well known to himself and not disclosed to the vendor, would not, ordinarily, amount to such a fraud as to avoid a sale and enable the vendor to bring trover. The rule, as deduced from the cases, seems to be, that no property passes to the vendee, if he purchased the goods with the preconceived design of not paying for them.

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Earl of Bristol v. Welsmore, 1 Barn & Cres. 520. *Noble v. Adams*, 7 Taun. 59. Chitty on Contracts, 405. Addison on Contracts, 49. *Lupin v. Marie*, 6 Wend. 82. 1 Greenl. Rep. 376. The question in these cases is one for the jury, and is, whether the vendor had made an improvident sale, or the vendee had fraudulently obtained the goods; whether there was a deliberate plan to obtain the goods, knowing they never would be paid for, which may be evidenced by a resale of them at a sacrifice, an assignment in insolvency or to a favored creditor, or absconding with the goods, or other circumstances, or whether he intended to continue his business and to try to pay for the goods at some time or other.

There is no cause of action set out in the petition, according to these principles. The other judges concurring, the judgment will be reversed.

ST. JOHN'S ADMINISTRATOR, Defendant in Error, vs. MCCONNELL, Plaintiff in Error.

1. A party who executed a note for the defendant *was held* a competent witness for the defendant, to show that he had no authority.

Error to St. Louis Court of Common Pleas.

C. Harding, for plaintiff in error.

T. Polk, for defendant in error.

SCOTT, Judge, delivered the opinion of the court.

Darby brought an action on a promissory note against McConnell, which was executed by J. Y. Munn, for M. McConnell & Co. There was a judgment for the plaintiff. The only question in the case is, whether Munn, the agent, who executed the note for McConnell & Co., was a competent witness for the defendant, Murray McConnell.

1. This suit was begun before the late law concerning practice

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went into force ; the competency of the witness, therefore, must be tested by the rules of the common law. An assumed agent may be received either to prove or to negative the fact of his being such agent. Hill & Cowen's Notes, 255. *Cox's adm'r v. Hill*, 3 Ohio, 423. Paley on Agency, by Dunlap, 387, note 13. The rule in *Walton v. Shelley*, 1 Term, 296, that *nemo allegans suam turpitudinem est audiendus*, has never been received in this state. *Bank of Missouri v. Hull*, 7 Mo. 276. As it has been suggested that Collins is dead, we will not examine the question as to his competency.

The other judges concurring, the judgment will be reversed and the cause remanded.

CLARK, Respondent, vs. BARRETT, Appellant.

1. The endorser of a negotiable note is not a security within the meaning of the act concerning "securities." R. C. 1845.

Appeal from St. Louis Circuit Court.

A. Buckner, for appellant.

Knox & Kellogg, for respondent. 1. The endorser of a negotiable note is not a security within the meaning of the act, and cannot discharge himself from liability by notice. 2. If it were otherwise, the notice in this case is not sufficient. 3. The court erred in refusing damages. *Clark v. Schneider*, 17 Mo. Rep.

SCOTT, Judge, delivered the opinion of the court.

This is an action against the endorsers of a negotiable promissory note, and the only question is, whether an endorser of such an instrument is a security within the meaning of the act concerning securities. The note was made by John Stickel to G. W. Rucker, and by him endorsed in blank, and afterwards by the defendant.

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1. The note having been made payable to Rucker, and being by him endorsed, is a circumstance which places this case without the influence of the principle of the cases of *Powell v. Thomas*, 7 Mo. and *Perry v. Barrett*, 18 Mo. The defendant being an endorser of a negotiable promissory note, is not a security within the meaning of the "act concerning securities." That act only contemplates parties who are all originally liable to the payee or obligee of the bill, note or bond. The obligation of the endorser is only collateral. Nor is its character affected by the fact that he endorsed only for the accommodation of the maker. It would greatly impair the utility of negotiable paper as a medium of commerce, to subject it to the provisions of the act concerning securities. It is a well settled principle of the law of commercial paper, that after the liability of all the parties to a bill or note is once fixed, no indulgence or delay of suit will affect their responsibility. The statute concerning bonds and notes having made the assignor liable to the assignee, in the event of his using due diligence in the institution and prosecution of a suit at law against the obligor or maker, clearly shows that it was not designed to extend to the endorser of negotiable securities.

The plaintiff was entitled to his damages as in case of a protested bill of exchange. But no relief can be furnished him, as he has not brought the cause here. The judgment is affirmed, with the concurrence of the other judges.

SCHNERR, Appellant, vs. LEMP, Respondent.

1. A servant employed by the year, at fixed wages, cannot recover any thing for his services, if he quits without cause before the expiration of the year.

Appeal from St. Louis Law Commissioner's Court.

C. Harding, for appellant. The appellant contends that the law in regard to entire contracts, of which there has been a

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partial or imperfect performance only, is, that the plaintiff, whose performance was the condition precedent to the performance of the defendant, cannot recover upon the contract itself, unless performance was prevented by the act of the defendant; but that, if the defendant has received and enjoyed any benefit from the plaintiff's partial or imperfect performance, he is liable to the plaintiff for the reasonable worth of the services performed, materials furnished, or goods sold and delivered; the defendant being permitted, if he choose so to do, to *recoup* such damages as he may have sustained by reason of any breach of the contract on the part of the plaintiff. *Britton v. Turner*, 4 N. H. 481. 4 McCord, 246, 249. Sedgw. on Dam. (2d ed.) 114. Notes to *Cutter v. Powell*, 2 Smith's L. C. 10 et seq. The old rule was different; but the hardship and injustice occasioned by its enforcement have led courts to evade its operation as far as possible. 9 Barn. & Cress. 386. 7 Pick. 181. 14 Mass. 282. 14 Mo. Rep. 378. 11 Vermont, 557. 20 ib. 630. 9 Mo. Rep. 857. 8 Bing. 14. 18 Wend. 187. 5 Denio, 406. *Helm v. Wilson*, 4 Mo. Rep.

S. A. Holmes, for respondent. The existence of a yearly hiring having been found by the jury, and the non-performance being admitted, the plaintiff could not recover. 3 Mo. 230. Ib. 233. 4 Mo. Rep. 41. *Posey v. Garth*, 7 Mo. Rep. 94. *Littel v. Mercer*, 218. 10 Mo. Rep. 609. Add. on Con. 739. Chitty on Con. 579, and cases cited. 12 J. R. 165. 19 ib. 338. Supposing the doctrine of the case of *Britton v. Turner*, 6 N. H. 481, to be the law of this case, yet the plaintiff had no cause of action until the expiration of the year. 9 N. H. Rep. 249.

GAMBLE, Judge, delivered the opinion of the court.

1. In the case of *Dickson v. Caldwell*, decided at the last term, it was held, that where a master hired his slave to another for a year, at a specified price, and without cause took

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him away before the expiration of the time, he could not recover the money which was agreed to be paid at the end of the year for the services. This decision was made under the authority of *Posey v. Garth*, 7th Mo. Rep. 96. The law thus declared is decisive of the present case. Schnerr engaged to serve Lemp by the year for fixed wages, and before the expiration of the year, without cause or excuse, abandoned the service and refused to perform his contract. He cannot recover.

The judgment is, with the concurrence of the other judges, affirmed.

FINNEY, Respondent, *vs.* BRANT, Appellant.

1. All cases originating in the St. Louis Court of Common Pleas, where there has been twenty days' personal service, are triable at the first term, notwithstanding the new code of practice.
2. Where several parties interested in resisting a suit, appointed a committee of their number to employ counsel and conduct the defence, and agreed in writing to pay to the committee such *pro rata* assessments as might be made against them to defray the expenses of the defence, and one of the parties to the agreement failed to pay the amount assessed against him, which was thereupon made up by the committee, *it was held*, that each member of the committee might sue separately for the amount paid by him.
3. In such a case, the statute of limitation only begins to run, at the date of the payment of the last assessment.
4. A suit brought by a member of the committee to recover back the amount paid by him, will not be defeated by the mere fact that it was actually paid by a firm to which he belonged, (he alone being a party to the agreement,) unless it appears that the money belonged to the firm, and was not paid on his account.

Appeal from St. Louis Court of Common Pleas.

John O'Fallon, J. B. Brant, J. G. Lindell, John Finney, Isaac Walker and many others united in the defence of suits brought to recover a tract of land known as the Clamorgan arpent, in which they were severally interested, and entered into the written agreement which is set out in the opinion of

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the court, by which the five persons named above were appointed agents to manage and conduct the defence, with power to appoint any of the other parties to the agreement to fill vacancies that might occur in their number from death, resignation or otherwise. The parties to this instrument agreed to pay "to the agents or their successors" such amounts as might be assessed from time to time to defray the expenses of the defence, in proportion to the value of their several interests, which was to be ascertained from the county assessment for the time being. O'Fallon and Brant refused to act on the committee to conduct the defence, and Solomon H. Robbins and Peter Lindell were substituted in their stead. The committee, in 1846, employed several counsel to defend the two suits which had been brought, one in the St. Louis Court of Common Pleas, and the other in the United States Circuit Court for the Missouri district, and agreed to pay them a fee of \$2000 each, one half of which was payable in six months, and the remainder upon the final determination of either of said suits, either in the United States Circuit Court or in the Supreme Court of Missouri. An assessment was made against each of the signers of the agreement for his proportionate share of the counsel fees, and a draft was drawn by the committee in favor of each of the counsel upon each of the parties to the agreement, payable in instalments, as the fees became due. This assessment was made upon the basis of the valuation in the county assessment of 1845. Brant refused to accept the draft drawn upon him for his share of the counsel fees, and they were paid by the committee, each member paying separate sums, at different times. This suit was brought by John Finney in 1853, to recover back the amount thus paid by him for Brant. Some of the payments were made by Finney in 1846, and others in 1852, as they became due by the terms of the draft and of the agreement by which the counsel were employed.

It appeared in evidence that two of the sums included in the amount sued for were actually paid by J. & W. Finney, a firm

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composed of the plaintiff and William Finney ; but it did not appear that they were not paid with the money or on account of John Finney, who was the only member of the firm liable under the agreement.

The cause was called for trial in the Court of Common Pleas at the first term. The defendant applied for a continuance, on the ground that it was not triable at that term, but there having been personal service on the defendant twenty days before the commencement of the term, his application was overruled. There was a judgment for the plaintiff and the defendant appealed.

Dayton and Shepley, for appellant. 1. The court below erred in refusing to continue the cause, and forcing the defendant to trial at the return term. New Code, art. 17, sec. 2. 2. Under the pleadings and proof, the plaintiff was not entitled to recover. A joint action should have been brought by the agents to whom Brant agreed to pay the assessments made upon him. His contract was with the agents as a body, and his responsibility was to them collectively. 3. The plaintiff was barred by the statute of limitations from recovering the money paid in 1846. R. C. 1835, p. 716, tit. "Limitations," art. 2, sec. 2. Ang. on Lim. (2d ed.) p. 135, 136, and notes. 4 McCord (S. C.) 210. 6 T. R. 189-94. 1 Barn. & Adolph. 15.

Barton Bates, for respondent. 1. It is of no importance that a portion of the money was paid by J. & W. Finney. John Finney was the agent and committee-man, and as such, under obligation to pay. *His obligation* was met, and it is entirely immaterial whether it was paid by his own hand, or by the hand of another. 2. The statute of limitations does not apply. The whole proceeding is under a special written contract, whereby an agency was created to carry on a complicated and continuing business. It is precisely like a running account, the last item of which being in time saves all. 3. This suit is properly brought in the name of Finney alone. It is not brought upon Brant's covenant to pay the calls,

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but upon the implied assumpsit for money pay for his use. This court has decided that a joint suit could not be brought, and the defendant, having had the benefit of that decision, now insists that separate suits cannot be brought.

RYLAND, Judge, delivered the opinion of the court.

1. The appellant contends, that the court below erred in refusing to continue the case, and in ordering the same to be tried at the first term. This was a suit in the Court of Common Pleas. When the Court of Common Pleas was first established, the 9th section of the act declared "that all cases originating in said Court of Common Pleas, when the process shall have been personally served on the defendant fifteen days before the commencement of the term, &c., shall be heard at the first term, unless good cause for a continuance be shown." Acts of 1840-41, p. 51. "The practice, process and proceedings of the court shall be the same, in all respects, as is or may be provided by law for the Circuit Court, except as herein otherwise specially provided." Sec. 8 same act. In the Revised Code of 1845, the time, instead of being fifteen days service before next term, is increased to twenty days service, and this is the only difference between the 9th section of the act of 1840 and '41, creating the court, and the 9th section of the revised act of 1844-45, chap. 42, tit. Common Pleas Court of St. Louis county. The 8th section of the act of 1844-45 is the same as the act of 1840-41. Now the special provision mentioned in these two sections, in regard to the practice, process and proceedings, takes the service of process from without the operation of the general law, when the suit is brought in the Common Pleas Court, and we must look to the time of service mentioned in the act concerning the Common Pleas. If, then, the service has been twenty days before the term, the first term is the trial term. We consider the practice act of 1849 does not repeal the provisions of the acts concerning service, in the cases originating in the Common

Pleas, and that the refusal of the court to continue this case is no error.

2. The second point relied upon by the plaintiff to reverse the judgment below is, that the plaintiff could not sue separately for money which he paid for defendant. It appears that some twenty-five persons, dreading the claim or claims of others, under one Jacques Clamorgan, to part of the tract of land of one by forty arpens granted to Gabriel Dodier, determined to make common defence against all suits, motions and proceedings in law or equity against them or any one of them, for any portion of said tract of one by forty arpens; that among this number was the defendant, Brant; that by agreement, these persons appointed agents to manage the matters of defence, to employ counsel to conduct all matters and things whatever, pertaining to a proper defence against all such suits, now depending or instituted, as well as all such as may be instituted or commenced against any of the persons signing said agreement, at any time within ten years from the date of said agreement. The agreement is as follows :

“These presents witness, that the undersigned do hereby constitute and appoint John O’Fallon, Joshua B. Brant, Jesse G. Lindell, John Finney, and Isaac Walker, their lawful agents and attorneys in fact, to direct, manage and conduct all matters and things whatsoever, pertaining to a proper and lawful defence against all suits, actions, motions or other proceedings in law or equity, now pending or instituted, as well as all which may be instituted, made or commenced against any one of the undersigned, at any time within ten years from the date hereof, by any person or persons whomsoever, claiming under Jacques Clamorgan, deceased, for the whole or any portion of the tract of one by forty arpens of ground granted to Gabriel Dodier, and being the second arpent north of and parallel to the king’s road, or St. Charles street, with full power to contract with and employ such counsel as they may deem fit, and do and perform all other things in the premises, which, at their discretion, they may think needful and necessary to be per-

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formed; and that they have full power to substitute, from time to time, some one or more of the undersigned to fill any vacancy which may happen in the number of said agents or attorneys, from death or otherwise; that the undersigned do hereby severally covenant, to and with said agents or attorneys, and their successors, that each will pay to said agents, from time to time, such calls, amounts or sums of money as they may make or assess against us respectively, to defray the expense of conducting said defence or other proceeding, to secure the undersigned against said Clamorgan claim; every such levy or assessment shall be upon each in proportion to the interest he holds in said tract of land. The county assessment, for the time being, shall be the rule of value upon which the assessment shall be made.

“These presents further witness, that, whereas, John O’Fallon and Jesse G. Lindell, in 1826, purchased said tract of land at sheriff’s sale, made in virtue of a judgment and execution against Jacques Clamorgan’s executors, which purchase, if sustained in law, will be good against all persons claiming under Clamorgan. Now the said O’Fallon and Lindell, parties hereto, not desiring to avail themselves of said purchase, beyond their interest to property within said tract, otherwise acquired, and that they hereby agree to and with each of the undersigned, who *bona fide* claim any part of said tract, that on the payment by them, to said O’Fallon and Lindell, of all money, with interest, by them expended in the premises, and pay all costs and fees whatever, accruing or to accrue in sustaining or attempting to sustain said purchase, they will give to each of the undersigned the benefit of said purchase, to the extent of his interest as aforesaid.

“Witness our hands, at the city of St. Louis, this 28th day of August, 1845.

“PETER LINDELL,

“J. B. BRANT,” &c.

The agents appointed had full power to contract with and employ counsel to conduct the defence. These persons signing said agreement were to pay to their agents and successors,

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from time to time, such calls, amounts and sums of money as they, the agents, may make or assess against them respectively. Every such levy or assessment shall be upon each in proportion to the interest he holds in said tract of land; the county assessment, for the time being, shall be the rule of value upon which the assessment shall be made. The agents were John O'Fallon, Joshua B. Brant, Jesse G. Lindell, John Finney and Isaac Walker. O'Fallon and Brant refused to serve, and the others named, in pursuance of the power given to them, filled the vacancy, by appointing Solomon H. Robbins and Peter Lindell.

These agents then employed counsel to defend the suits which had been brought by one Fidelio Sharp and others in the Circuit Court of the United States for Missouri; also to defend suit instituted in the Common Pleas Court. They agreed to pay the counsel, that is Gamble & Bates, two thousand dollars — one thousand in six months, and the balance upon the determination of any one of said suits upon the merits, either in the Circuit Court of the United States for the Missouri district, or in the Supreme Court of Missouri. They employed Spalding & Tiffany upon the same terms as Gamble & Bates, Geyer & Dayton upon the same terms, and Judge Lawless upon the same terms. The suits were finally settled by a decision of the Supreme Court of the United States, in which the persons making the agreement succeeded in defeating the Clamorgan claim, and the defendant in this suit was quieted in his possession, and became, by the judgment of said court, legally entitled to a large amount of property.

In order to pay the fees of the counsel employed, the agreement had settled upon a principle of assessment. The owners of the interests adverse to Clamorgan, had agreed that the agents shall make the assessment according to the rights and interests of each in the tract, and this assessment shall be according to the value, to be ascertained by the county assessment for the time being. The agents employed Mr. Shepley to examine the county assessment and get the basis upon which

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they might make the proportionate assessment, and then make the calls upon each for his contribution.

This was done and the assessment made. Calls were accordingly adjusted to the interest of each respectively in the land. These agents then drew on the defendant, Brant, for his share of the money, and he refused to pay, alleging an improper assessment. These agents then, not as partners, but as persons who had employed counsel to defend the law suits of the defendant, became personally liable to the attorneys and counsel employed, and each separately paid a portion of the money which the defendant, Brant, should have paid. Brant was one of those who had authorized these persons to employ counsel to defend his suit; the counsel defended Brant's suit successfully. Brant refused to pay the calls made upon him by these agents, and these agents had each to pay separately for him a large amount of money, at different times, to the different lawyers and counsel. They united in bringing suit to recover the money from Brant, and it was held by this court that these persons were not partners, and that they did not jointly pay out the money for Brant, but each paid separately his proportion of the amount from his own means, which Brant ought to have paid, and each had his separate cause of action against Brant.

This first decision ruling against the joint action was made upon the point specially relied on by Brant's counsel at that time. Now the objection is seriously made against the separate action of those who have each paid out his own money to defend Brant's law suit—paid out money not from a joint fund, but from their own purses, in different portions, at different times. This point is ruled against the defendant.

3. The defendant's third point is the statute of limitations. It also will prove unavailing. The money paid for him was paid partly in 1846, more than five years before the commencement of this suit, but it was on a contract with counsel requiring a part in six months and a part when the suits were finally disposed of on the merits. A part of the money was paid in

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1852, and some in January, 1853. These payments are considered as a running account, and the last item brings down the whole within the statutory time.

4. The objection, that the firm of John and William Finney paid the money for Brant and not John Finney, and that the firm of John and William Finney ought to sue, and not John, is also untenable. John Finney was bound; was liable to pay the fees, which, as one of the agents, he had agreed to pay counsel for Brant and others. Now this liability of John was discharged by the payment for John, by the hands of John and William Finney, but we cannot say that it was not with John's money. There is no proof that the payment was with the partnership funds; it was obviously made for him, for he was responsible and not his firm. To say that the payment of this individual liability by the firm was not such a payment as could authorize the individual to sue, would be exceedingly refined and technical, and in this case, this court cannot be expected to search out for technical objections against a judgment apparently for the right party.

The judgment below is affirmed, Judge Scott concurring.

LINDELL, Respondent, *vs.* BRANT, Appellant.

1. Several parties united in defending a suit which involved the title to a tract of land in which they were interested. They appointed a committee of their number to conduct the defence, and all agreed to pay such assessments as might be made upon them to defray expenses, in proportion to the value of their respective interests. *Held*, it was only necessary for the committee to make one valuation of the land, upon the basis of which calls might continue to be made until the end of the litigation, although the relative value of the several interests might have changed.

Appeal from St. Louis Court of Common Pleas.

This was an action brought by Lindell to recover back money paid for the defendant, Brant. The facts are the same as in

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the preceding case of *Finney v. Brant*, with the following addition: After the assessment in 1846, further expenses were incurred for fees of counsel employed to argue in the Supreme Court of the United States one of the causes involving the title to the Clamorgan arpent; and to pay these expenses, an apportionment was made in 1851, based upon the same valuation of the respective interests in the land as that upon which the assessment was made in 1846. Lindell contributed to make up the amount assessed to Brant as his proportion of these additional expenses. The evidence showed that, according to the county assessment in 1851, Brant's property in the Clamorgan arpent was then of much less value, in proportion to the value of the property of the other signers of the agreement, than it was at the time of the valuation, upon the basis of which the assessment was made. The property of some of the signers of the agreement had doubled in value from 1846 to 1851, whereas Brant's had only increased in value about two-fifths.

The plaintiff recovered judgment below for the whole amount claimed by him and the defendant appealed.

Dayton and Shepley, for appellant.

Barton Bates, for respondent.

RYLAND, Judge, delivered the opinion of the court.

The opinion in the case of *Finney v. Brant*, just delivered, will also decide the main questions in this case. The refusal of the court to continue at the first term, the statute of limitations, the objection to the right of each plaintiff to sue separately, have each been settled in *Finney's* case against Brant.

1. The additional matter in this case, not mentioned in *Finney's* is, in regard to the construction of the agreement. (See the agreement as set forth in the opinion in *Finney's* case.) Every such levy or assessment shall be upon each in proportion to the interest he holds in said tract of land. The county

assessment, for the time being, shall be the rule of value, when the assessment shall be made.

Now the appellant contends that, whenever a call is made on the subscribers to the agreement for money to defray expenses, a new assessment must be made from the county assessment. To this the plaintiff below answers : The valuation of the respective interests held in the tract is, by the terms of the agreement, not to be made by the parties or their agents, but is to be ascertained and adopted from the county assessor's books. At the time this is agreed to be done, each is cognizant of the rights of all, and of the common danger. The valuation is one thing, the call for payment another. There is no need of but one valuation, but calls for money may be as often as expenses are incurred. The county assessment, for the time being, shall be the rule of value upon which the assessment shall be made. One assessment is provided for, but calls may be made, from time to time, as often as occasion may require. That one assessment is to conform to the county assessment for the time being, that is, when the individual assessment is made, or the settlement of the proportions, which is the same thing, is made. If every call is to be apportioned by a new valuation, then, whenever a bill of costs is to be paid, there must be a new valuation, which could hardly have been intended. The contract provides that every such levy or assessment "shall be upon each one, in proportion to the interest *which he holds* in said tract of land"—that is, now holds, at the date of the agreement. In the opinion of the court, the plaintiff's construction is the proper one ; otherwise, after these gentlemen had employed counsel, at the expense of ten thousand dollars, and after they had agreed to battle together against Clamorgan's claim, for ten years, any number might have sold out and left the burden on a small part of the original subscribers, and there could be no future assessment on them ; for, after sale, there would be in them no interest. Such never was the understanding ; the agreement was, to adopt the county assessment, in order to proportion the burden

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between the parties. If the apportionment was made in order to ascertain how much each one's property in the tract of land was worth at the time of the apportionment thus to be made, the county assessor's books were to be the rule of value, the basis of the individual responsibility, and upon that basis any and every call must be made to rest. If, therefore, the first assessment was needed in 1845 or not until 1846, the assessment of the county was to form the rule for the individual assessment; when once this rule was laid down, this proportion ascertained, it was enough; any future call might be made upon the individuals, though such should have sold their interests after making the agreement.

Upon the whole case, it is the opinion of this court that the judgment below be affirmed, Judge Scott concurring; Judge Gamble not sitting.

CLARK *et al.*, Respondents, *vs.* MIDDLETON & RILEY, GAR-
NISHEES OF THE COLUMBUS INS. Co., Appellants.

1. The mere fact of the insolvency of an insurance company, when an insurance is effected, does not avoid the contract, nor exempt the assured from his liability to pay the premium, in the absence of any fraud.
2. The failure of the agency of a foreign insurance company to file the statement required by the act to license and regulate such agencies, does not avoid promises made to the company to pay the premium on insurance.

Appeal from St. Louis Circuit Court.

Glover & Richardson, for appellants. The contract of insurance requires *uberrima fides* between the parties, and the concealment or suppression by either party of a material fact will avoid the policy; and the effect is the same, whether the concealment is "by design or through negligence, mistake, inadvertence or oversight." 1 Phil. on Ins. (old ed.) 80. The obligations of good faith are equally binding on the as-

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sured and the underwriter. The solvency of the company is a material fact in every contract of insurance. *Carter v. Boehm*, 3 Burrow, 309. *Oom v. Bruce*, 12 East, 224. *Henry v. Standeforth*, 4 Camp. 271. 1 Maule & S. 39. 5 ib. 124. 1 Camp. 401. *Feise v. Parkinson*, 4 Taunt. 640. The conduct of the company was a gross fraud upon the public. Similar conduct on the part of an individual would avoid a contract, at the option of the injured party. 12 Pick. 307. 9 Gill & J. 278. The failure of the company to comply with the act to license and regulate agencies of foreign insurance companies, (R. C. 1845, p. 609,) avoided the contract. The infliction of a penalty for transacting business before complying with the law, implies a prohibition. 1 Kent's Comm. 467. *Downing v. Rainer*, 7 Mo. Rep. 586.

Haight and *Shepley*, for respondents. There is no law making the contracts of a person who is not solvent absolutely invalid, nor is it believed that, in this respect, there is any difference between corporations and individuals. It is not stated in the answer that, so far as the garnishees are concerned, the Columbus Insurance Company did not perform all that they contracted to do, or that the company ever failed to pay any losses of property insured by them, from the time this insurance was effected. It frequently happens that an insurance company, at a particular time, may be in a situation that, if obliged to stop, they would not be able to pay all their debts. Shall all their contracts therefore be deemed invalid?

GAMBLE, Judge, delivered the opinion of the court.

Middleton & Riley being summoned as garnishees on an execution in favor of Clark & Co., against the Columbus Insurance Company, answered an interrogatory in relation to their indebtedness to the company, by stating that they had effected insurance with an agency of the company and that the premium on such insurance amounted to \$474 54. They further stated that when the policy was issued, the company held itself

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out to the public as entirely solvent and able to meet its engagements in the line of its business, and that the garnishees, relying on the representations of the company, accepted the policy, when the fact was, that the company was not then solvent or able to meet its engagements, as its agents and servants well knew, except, perhaps, the agent who issued the policy to them. The garnishees further alleged that the Insurance Company had failed to file the annual statement required to be filed by the act to license and regulate the agencies of foreign insurance companies, and claimed that the entire contract of insurance was thereby rendered void.

1. The mere fact of the insolvency of the company, at the time of issuing the policy to the garnishees, does not authorize them to repudiate it as a contract, and claim an exemption from liability to pay the premium. There must have been an actual fraud practiced upon them, by which they were deceived. It has been decided at the present term of this court, that the mere insolvency of a person who purchases goods on a short credit, does not authorize the seller to annul the sale and reclaim the property. There must be a fraudulent purpose on the part of the purchaser, and a contrivance to effect it. *Bidaull v. Wales and others*, antè, 36.

In the present case, the charge is, that the Insurance Company held itself out to the public as solvent, when, in fact, it was insolvent. What act was done, what representation was made by which the garnishees were deceived, is not stated. Whether there was any purpose to deceive, is not stated, but it would appear from the answer, that probably the agent with whom they dealt did not himself know that the company was insolvent. The insurance was effected in February, 1851, on goods to be transported from the eastern cities to St. Joseph, in this state, and the answer which was filed in June, 1852, long after the goods must have been received, discloses, for the first time, the objection to the contract, that the company was insolvent. The authorities cited on the part of the garnishees, have no application to the question.

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2. This court has before passed upon the question, whether the failure of an agency of a foreign company to file the statement required by the act, avoids the promises made to the company to pay the premium on insurance, and we have held that it has no such effect.

The judgment is, with the concurrence of the other judges, affirmed.

CARLISLE'S ADMINISTRATORS, Appellants, vs. MULHERN & KEYSER, Respondents.

1. Under the new practice, a court trying a cause without a jury need not set out in its finding those facts admitted in the pleadings.
2. Where two partners purchased a leasehold with partnership funds, and gave a deed of trust upon it, and after the death of one of them, the lease was sold under the deed of trust, *it was held*, that the lease was to be treated as partnership property, so as to entitle the surviving partner to administer the deceased partner's share of the surplus, after paying the debt, and not the administrator.

Appeal from St. Louis Court of Common Pleas.

Lackland and Jamison, for appellants. 1. The court below erred in not stating all the material facts admitted by the pleadings to be true, and those proven on the trial. New Code, art. 15, sec. 2. *Gobin v. Hudgens*, 15 Mo. Rep. 400. *Brant v. Robertson*, 16 Mo. Rep. 140. 2. The leasehold estate was held by the lessees as tenants in common. The lease was made to them in their individual names. 2 Randolph's Rep. 187. 5 Mo. Rep. 507. 15 J. R. 160. 5 Ohio Rep. 264. 3. If, however, the leasehold was in fact partnership property, yet, as the lease was to the partners as individuals, and the surviving partner has suffered the appellants to pay one half of the ground-rent and taxes with the money of the estate of the deceased, he cannot now be permitted to show that it was partnership property.

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T. T. Gantt, for respondent. The court below found that the property sold by the trustees was, as to Carlisle & Keyser, partnership property, and that the partnership affairs were unsettled. The decision was a clear deduction from the facts found, and the finding is supported by the evidence.

GAMBLE, Judge, delivered the opinion of the court.

Carlisle & Keyser being partners, doing business in St. Louis, became interested in a lease of real estate in the city as partners, improved the same out of their partnership funds, and continued to hold the same as partnership property until the death of Carlisle, whose administrators bring this suit. While both were alive, they gave a deed of trust on the property, to secure a partnership note, the defendant, Mulhern, being the trustee. After the death of Carlisle, Keyser, the surviving partner, continued to administer the effects of the firm. The note secured by the deed of trust not being paid, the trustee, after the death of Carlisle, sold the property in pursuance of the power given him, and upon that sale there was a surplus in his hands after paying the note. The controversy is about this surplus, which has been paid over to Keyser, Carlisle's administrators claiming one half of it as the money of their intestate, and Keyser, the remaining partner, claiming that it is partnership funds, which he is entitled to administer and with which he claims the right to pay the partnership debts. The liabilities of the firm exceed its assets, and Keyser is in advance to the firm to a considerable amount. The affairs of the firm are not settled.

1. It is objected to the judgment in this case, that the court has not, in its decision, stated all the material facts in the case. This objection, it is understood, is intended to present the question whether the court, when trying a case without a jury, shall state, in its decision, the facts admitted in the pleadings of the parties, as well as those controverted and found upon evidence.

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It might be very convenient to this court to have all the facts upon which the judgment is founded, embodied in the decision of the court, but it is not necessary to a proper understanding of the grounds of the judgment, that the facts which the parties have admitted should be again spread upon the record in the shape of a finding by the court. The pleadings are themselves parts of the record, and if it appear that the judgment is a correct conclusion upon the whole case, as made by the pleadings and finding, it will not be reversed.

2. It is objected that in this controversy it cannot be shown that the leasehold property was partnership property, because the lease is made in the name of the individuals composing the firm of Carlisle & Keyser. There is nothing in this objection. The evidence does not contradict or even vary the effect of the written instrument, but tends to charge the property with a liability to the debts of the partnership, because of the character of the funds with which it was obtained and improved, and the manner in which it was held and used by the partners themselves.

It is next insisted that, as the lease in this case was made to David Carlisle and Rufus Keyser, in their individual names, it was not partnership property. It appears sufficiently that these partners, being brick makers and brick layers, acquired their interest in the property by the advance of partnership money, as an investment of so much of their partnership funds, to be held for their joint benefit.

There has been some contrariety of decision in the English and American courts, upon the question of whether freehold estates in land, purchased by a partnership with their joint funds, become partnership property, to be treated as a fund for the payment of partnership debts. Without a labored examination of these decisions, the result of the authorities may be stated to be, that real estate, purchased out of partnership funds, to be used and applied to partnership purposes, and considered and treated by the partners as part of the partnership stock, is to be deemed and considered, so far as the legal

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title is concerned, as estate held in common and not in joint tenancy ; but as to the beneficial interest, it is held in trust, each holding his property in trust for the partnership, until the partnership account is settled and the partnership debts are paid. It is a trust arising from the actual or implied agreement of the parties, and from the mutual relation in which they stand to each other. The rule of holding it a trust estate in regard to the partners, is founded on the equity of the surviving partner, who being chargeable with all the debts of the firm ought to have the control of all the assets ; first, for the payment of the debts of the firm, and secondly, for the restoration to himself, on settlement of the partnership accounts, of that part of the capital which has been contributed by him to the common stock. The true and actual interest of each partner in the common stock, is the balance found due to him after the payment of the debts and the adjustment of the partnership account.

In the present suit, which, under our code, is to be decided upon equity principles, the facts that the partnership accounts are unadjusted, that the debts of the partnership exceed its assets, and that Keyser, the surviving partner, is largely in advance to the firm, render the claim of the representatives of Carlisle to the surplus produced by the sale of the property, inequitable and inconsistent with the relations existing between the partners when this property was acquired. It may be further remarked, that the property out of which this surplus arose, was not freehold but leasehold, and, therefore, upon the death of Carlisle, it should be treated as other personalty of the firm, in making distribution of it among the partners, or between the surviving partner and the representatives of a deceased partner. Collyer on Part., sec. 136.

Certain leasehold estates are treated by our statutes as real estate, liable to dower, &c., while others are treated as personalty. This lease being for ten years only, is of the latter class.

The judgment of the Court of Common Pleas is, with the concurrence of the other judges, affirmed.

KIMM, Respondent, *vs.* OSGOOD'S ADMINISTRATOR, Appellant.

1. Where letters of administration were granted January 12, 1852, a demand exhibited January 12, 1853, was held "within one year after the granting of the letters."

Appeal from St. Louis Circuit Court.

The facts sufficiently appear from the opinion of the court.

C. C. Whittelsey, for appellant. The court erred in placing this demand in the fifth class, instead of the sixth. It was not exhibited "within one year after the granting of letters" of administration on the estate. The day on which letters are granted is to be included, and the day of the same date of the succeeding year excluded. A part of the day is to be counted as a whole day. It is plain that, had the court been in session, the administrator might have waived notice, and the demand might have been allowed on the day when letters were granted. This is not the case where a thing is to be done a certain number of days *after date* simply, but *within* one year after the *granting of the letters*. When the computation is to be made from an act done, the day on which the act is done is to be included. *Arnold v. United States*, 9 Cranch, 104. 3 Pet. Cond. Rep. 328, 330 and notes, 331. *Pierpont v. Graham*, 4 Wash. C. C. R. 232. *Castle v. Burdett*, 3 T. R. 628. 3 East, 407. 4 Esp. Rep. 224. 14 Mees. & Wels. 574. 15 Mass. 219.

Krum & Harding, for respondent. 1. When time is to be computed from or after a certain day, that day is to be excluded from computation. 4 N. H. 267. 6 Cow. 659. 4 Shep. 181. 4 Scamm. 420. 7 J. J. Marsh. 202. 7 Monroe, 520. 2. When time is to be computed from or after any act done, the day on which the act is done, is to be excluded from the computation; for a day is to be considered an indivisible point of time, and there can be no distinction between a computation from an act done, and a computation from the day

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on which the act is done. 1 Pick. 485. 1 Met. 127. Breese's Rep. 3. *Blain v. Beehler*, 12 Mo. Rep. 477.

GAMBLE, Judge, delivered the opinion of the court.

Probably no question of the same importance has so much engaged the attention of courts, or has been so often and so variously decided, as how time shall be computed. It is utterly impossible to reconcile the decisions of different courts of equal ability, and therefore, instead of undertaking so useless a labor, the views of the court upon the question involved in the present case, will be briefly stated. The administration act, (R. C. p. 90) places in the fifth class "all demands that shall be legally exhibited within one year after the granting of the first letters on the estate." It places in the sixth class "all demands thus exhibited after the end of one year and within two years after letters granted." Letters of administration on the estate of Osgood were granted January 12th, 1852, and the plaintiff's claim was exhibited January 12th, 1853. The controversy is, whether it should be placed in the fifth or sixth class.

1. It is obvious that, if fractions of days were to be regarded, it might be that a notice served on the 12th January would be within a year from the grant of letters on the 12th of January preceding. If letters were granted at noon of the 12th January, the year would not be actually completed until noon of the next 12th January. But in such computations, the rule is, to exclude fractions of days, except in those cases where justice requires an examination into the precise time of the day at which an act was performed. The fiction that a day is an indivisible point of time, will not be allowed to work a wrong. But this is only permitted in furtherance of justice.

Without collating the numerous authorities which have been cited, or the still more numerous decisions to be found in the Reports, without referring to the conflicting opinions upon the difference between the words "from the date" and "from the

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day of the date," which Lord Mansfield, in *Pugh v. The Duke of Leeds*, Cowp. 714, showed to mean the same thing, we will merely refer to some cases, which we think correctly declare the law applicable to this case.

In Massachusetts it was held, in *Bigelow v. Wilson*, 1 Pick. 487, under a statute which allowed the redemption of an equitable estate sold on execution "within one year next after the time of executing by the officer to the purchaser, the deed thereof," that in computing the year allowed for the redemption, the day on which the deed was executed should be excluded.

In *Simms v. Hampton*, 1 Serg. & Raw. 411, the Supreme Court of Pennsylvania held that, in computing the twenty days allowed for entering an appeal with the prothonotary after the entry of the award of arbitrators upon his docket, the day upon which the entry of the award was made should be excluded. The words of the statute are, "shall enter such appeal with the prothonotary of the proper county *within* twenty days after the entry of the award of the arbitrators on his docket."

In *Wendson v. China*, 4 Greenl. 302, the Supreme Court of Maine decided, that an answer which the statute required to be given to a notice "*within* two months after such notice," was in time when given on the 20th December, the notice having been given on the 20th of October. The day on which the notice was given was excluded.

These decisions from other states assert the same rule which was adopted by this court in *The Steamer Mary Blane v. Beehler*, 12 Mo. Rep. 477.

We state the rule then to be, that in the computation of a period of time from an act done, the day on which the act is done is to be excluded. Consequently, the notice in the present case, given on the 12th January, 1853, is within a year after the grant of letters of administration, granted on the 12th January, 1852.

The judgment of the Circuit Court is therefore affirmed, with the concurrence of the other judges.

Smith v. Dean.

SMITH & KINZER, Plaintiffs in Error, *vs.* DEAN, Defendant
in Error.

1. Under the new practice, a party suing upon a bond must state his title in his petition. It is not sufficient to aver that he is the legal holder.
2. The statute of limitations cannot be taken advantage of by demurrer.

Error to St. Louis Circuit Court.

Knox & Kellogg, for plaintiffs in error. 1. It was not necessary to state in the petition how the bond sued on was assigned. The statement that the plaintiffs were the legal holders of the bond, as trustees of Crupper, for the benefit of his creditors, is a sufficient averment of title in said plaintiffs. 2. By the first and second sections of the third article of the act entitled "an act to reform the pleadings and practice in courts of justice," the plaintiffs had a right to sue in their own names, whether the bond had been assigned to them by any instrument of writing or not, if they were the real parties in interest. 3. The defendant cannot avail himself of the statute of limitations, by way of demurrer, nor are the plaintiffs required to state any facts in their petition that might prevent the statute of limitations from barring their demand. The statute of limitations, under the old system of pleading, must have been pleaded, and can now only be set up by way of answer. *Chitty on Pleadings*, 515, 520. 3 J. J. Marsh. 363. *Smart v. Bingham*, 373. *Smart v. Jackson*, 2 Wend. 294. *Jackson v. Varick*, 4 Har. & J. 539. *Maddox v. Stile*.

Rankin and Krum, for defendant in error. The demurrer of the defendant below to the plaintiff's petition was properly sustained by the court. The plaintiffs did not show upon the face of their petition a cause of action against the defendant. No assignment or transfer in writing of the bond sued on, to the plaintiffs, is stated in the petition. 8 Mo. Rep. 355.

GAMBLE, Judge, delivered the opinion of the court.

The plaintiffs claim to recover on a bond made by the defendant, Dean, payable to one Crupper. They allege that they are the legal holders of the bond, as trustees of Crupper, for the benefit of his creditors. The bond was payable on the 2d of September, 1840. There is no allegation that the bond was assigned to the plaintiffs. The petition was demurred to and the demurrer was sustained. Two questions are presented on the demurrer: 1. Whether the title of the plaintiffs to the bond is sufficiently stated in the petition. 2. Whether the petition does not show that the action on the bond is barred by the statute of limitations.

1. We will not say how far the act requiring the assignment of bonds and notes to be by indorsement thereon, in order to enable the assignee to sue in his own name, is affected by the code of practice, which abolishes the distinction between law and equity, and requires all suits to be commenced and prosecuted in the name of the real party in interest. But if an assignee, or the person beneficially interested in a bond may sue thereon, without stating an indorsement, he must still state his title in his petition. To state that he is the legal holder, is to state a conclusion of law from facts that are traversable. He must state facts that give him the title to the bond, when, upon its own face, the title appears to be in another. The obligation of the defendant was, to pay money to Crupper. By what facts did he become bound to pay it to plaintiffs? The petition fails to state the facts. The petition says the plaintiffs are the legal holders, as trustees of Crupper, for the benefit of his creditors. This is no statement of any act done by Crupper transferring the bond. The plaintiffs may be constituted such trustees by the act of Crupper, or if the transaction occurred in another state, they may be trustees of an insolvent debtor, appointed by law. The petition is, in this respect, defective.

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2. The ground of demurrer, that the petition shows the action to be barred by the statute of limitations, is not available. The petition states a cause of action upon which a recovery may be had, and judgment upon such petition would not be disturbed because of the insufficient statement of the cause of action. Time is not, under the act of limitations, a bar to the action under all circumstances, and we will not require a plaintiff, in his original petition, to state the facts by which the action is to be maintained, notwithstanding the lapse of time since the cause of action accrued. It is better to allow the petition to contain only a statement of the original cause of action, until the defendant, in his answer, shows his intention to avail himself of the defence under the act.

The judgment is, with the concurrence of the other judges, affirmed.

NORCUM, Respondent, vs. GATY *et al.*, Appellants.

1. *Youse v. Norcum*, 12 Mo. Rep. 549, affirmed.
2. Where a minor *feme covert* joined with her husband in a deed conveying a lot belonging to her, *it was held*, that possession under the deed was adverse to any interest in the lot subsequently acquired by the wife, and adverse to any outstanding interests, and did not, as to such interests, enure to the benefit of the wife.
3. No principle of the Spanish law is known, making an after acquired title enure to the benefit of a former grantee.

Appeal from St. Louis Court of Common Pleas.

This was an action of ejectment, begun by Frederick Norcum, in 1848, for block 16 of the city of St. Louis, in which the recovery was for thirty-seven feet on Main street, by one hundred and thirty-four feet in depth. The defendants appealed to this court. The facts are in all respects, similar to those in *Youse v. Norcum*, 12 Mo. Rep. 549, with the following exceptions :

In the present case, the plaintiff gave in evidence a confirmation of a lot of 240 by 150 feet to Nicholas Lecompte's representatives, by the act of congress of April 29th, 1816, and an official survey of block 16, purporting to be also a survey of the confirmation. It was proved that Nicholas Lecompte had nine children—six sons and three daughters. The sons were Nicholas Hebert, Louis or Louison, Pierre, Guillaume, Joseph and Hyacinth. The daughters were Theresé, married to Charles Buisson, Julia, married to Joseph Bissonet, and Marie Louise, married to Joseph Vasques. Louis died before his father, without children. Theresé died before her father, but left one child, who died, according to the statement of a witness, about twenty-one or twenty-two years before the trial. This statement, however, is irreconcilable with another statement of the same witness, that the child died after the death of its grandfather, Nicholas Lecompte, at about the age of eight years. It was in evidence that Nicholas Lecompte, the elder, died in April, 1815. Charles Buisson, husband of Theresé, was alive at the death of their child. Joseph Lecompte died unmarried after his father, at the age of about fifteen.

Pierre Chouteau, jr., was shown the deed dated September 9, 1815, and testified that he signed the same as attorney in fact of Peter Hebert Lecompte, one of the parties thereto, under a power of attorney, but he could not find the power of attorney, and did not know what had become of it.

It will thus be seen, as the case is here presented, that there were interests which Mrs. Vasques did not acquire by the deed of September 9, 1815. These interests were, 1. That of the child of Theresé, wife of Charles Buisson, unless the child died before that deed was executed, in which case its interest passed, the deed having been executed by its father and heir. 2. That of Joseph Lecompte, unless he died before the date of the deed. 3. That of Peter Hebert Lecompte, unless the execution of the deed by Chouteau was effectual to pass his interest.

The deed of September 9, 1815, was a partition deed, executed by the children and heirs of Nicholas Lecompte, the elder,

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making a division of his estate ; by which, a lot of thirty-five feet, French measure, in block 16, was set apart to Marie Louise, wife of Joseph Vasques. This is the lot in controversy.

The deed from Vasques and wife to Hanley, made in 1816, during the minority of Mrs. Vasques, the mortgage from Hanley to Mullanphy, the foreclosure of the same, and the sheriff's deed to Mullanphy, under whom the defendant is in possession, were in evidence in this case, as in the case of *Youse v. Norcum*. It was in evidence that Mullanphy entered into possession under the sheriff's deed in 1824 or 1825, and made improvements.

The plaintiff claimed under a deed from Louis A. Labeaume, to whom Joseph Vasques and wife, by deed dated April 24th 1846, conveyed the same lot conveyed by their deed of 1816 during the wife's minority. Joseph Vasques was dead when this suit was commenced. Both he and his wife resided in St. Louis county up to his death.

The court instructed the jury that the deed of 1846, from Vasques and wife to Labeaume, avoided their deed of 1816 to Hanley, if Mrs. Vasques was then a minor, and refused to instruct that the fact that neither Vasques nor his wife rescinded or attempted to rescind the deed of 1816, within four years after the wife's majority, or the fact of their silence while those claiming under the deed of 1816 were making improvements, amounted to a ratification. As to the outstanding interests in the lot, not vested in Mrs. Vasques by the partition deed of September 9th, 1815, the court gave the following instruction for the plaintiff :

4. By the marriage of Joseph Vasques with Marie Louise Lecompte, he became possessed of an estate in the premises in controversy for his life, and if John Mullanphy and his heirs or representatives entered into possession under Joseph Vasques, and have possessed under him for more than twenty years, such possession, under the circumstances of this case, was adverse to any other claimant under Nicholas Hebert, *dit*

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Lecompte, and every such claimant is barred, unless proved to be within some one of the exceptions in the statute of limitations. Such bar is available to the plaintiff in this suit, claiming under Marie Louise, wife of said Vasques, who had the estate in remainder after the death of her husband.

E. Bates and J. R. Shepley, for appellants. 1. The case of *Youse v. Norcum*, 12 Mo. Rep. 549, in which it was decided that the deed of Vasques and wife to Labeaume in 1846, annulled their deed to Hanley, made in 1816, stands alone among a train of decisions on the same subject, and we think ought to be reviewed. 2. If, however, the plaintiff could recover at all, he could only recover such portions of the lot as Vasques and wife conveyed to Hanley, and in addition thereto, such portion as Marie Louise Vasques subsequently acquired by inheritance. The evidence showed that two, if not three, of the eight shares of the estate of Nicholas Hebert Lecompte were not obtained by the deed of September 9th, 1815. The title acquired by the grantors in the deed to Mrs. Vasques, by inheritance from the child of Mrs. Buisson and from Joseph Lecompte, did not enure to Vasques and wife. That title is now either outstanding, or it is barred by the twenty years' adverse possession of Mullanphy and those claiming under him; in neither of which cases can it be recovered by the plaintiff. The respondents show no authority for the *dictum* that by the Spanish law, an after acquired title enured to the grantee. 3. The court erred in instructing the jury that Mullanphy's possession enured to the benefit of the plaintiff. Mullanphy's possession was adverse to Vasques and wife and to the plaintiff, as to all portions which Mrs. Vasques had not acquired by deed or inheritance, and gave him a *title* to those portions. 5 Peters, 438. 16 Peters, 492. 5 Serg. & Raw. 236. *Biddle v. Mellon*, 13 Mo. Rep. 335. 8 Wend. 440. 13 Conn. 235. The title thus acquired by possession to those portions never owned by Vasques and wife, no more enured to Mrs. Vasques or those claiming under her, than would a title which Mullanphy had acquired to those portions by *deed*.

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W. L. Williams, for respondent. 1. The deed to Mrs. Vasques was made in Spanish times, and by the Spanish law, was sufficient to pass any after acquired interest of any of the parties thereto. The interest of Pierre Lecompte passed by the deed, which was signed for him by Chouteau, his attorney. By the Spanish law, an attorney may act in his own name, stating for whom he acts. The share of the child of Theresé, upon its death, went to its father, Charles Buisson, who was one of the grantors in the deed to Mrs. Vasques. If Joseph died before the deed to Mrs. Vasques was executed, then his share passed by that deed. If, however, he was alive when that deed was executed, and died afterwards, then his share went to his brothers and sisters and their representatives, and enured to Mrs. Vasques by virtue of their deed to her. Thus in fact there were no outstanding interests. 2. If, however, there were any outstanding interests, then they were barred by the twenty years' adverse possession of Mullanphy and those claiming under him, and this bar was available to the plaintiff, as is asserted in the fourth instruction. An outstanding title is extinguished by twenty years' adverse possession, and cannot be set up by the party in possession under a deed conveying a life estate, to defeat the title of the reversioner. Tillinghast's Adams, p. 30. *Peck v. Carmichael*, 9 Yerg. 325. 4 J. R. 202. 4 Dana, 561-2. 9 Dana, 452. 3 Wash. C. C. R. 498.

RYLAND, Judge, delivered the opinion of the court.

1. The facts in this case, that is, the main facts on which the questions of importance arise, are substantially the same as those in the case of *Youse v. Norcum*, heretofore decided by this court, (12 Mo. Rep. 549,) and to that case we refer as deciding this.

2. Yet this case must be reversed, because of the latter part of the fourth instruction given for the plaintiff. This part of the instruction operates in favor of the plaintiff, by making

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Mullanphy's possession enure to the benefit of plaintiff, whereas, Mullanphy's possession was adverse to the right which Mrs. Vasques acquired after the deed of herself and husband to Hanley, and was adverse to all others.

3. We know of no principle of the Spanish law, making an after acquired title enure to the benefit of a former grantee.

The judgment is reversed, and the cause remanded; Judge Scott concurring; Judge Gamble not sitting.

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CROLE, Respondent, vs. THOMAS, Appellant.

1. No express contract being alleged, a party suing for services rendered can only recover what they are reasonably worth.

Appeal from St. Louis Law Commissioner's Court.

S. A. Holmes, for appellant.

A. P. & P. B. Garesché, for respondent.

RYLAND, Judge, delivered the opinion of the court.

This was an action in the law commissioner's court, by Crole against Thomas, for work done on board the Carondelet steam ferry boat, as engineer and master, and taking care of ferry flats from 1st June, 1851, to 15th July, at sixty dollars per month. The particulars of the claim were as follows:

"James S. Thomas, to Martin Crole, Dr.

"For work done on board the Carondelet steam-ferry boat as engineer and master, and taking care of ferry flats from June 1st, 1851, to July 15th, at \$60 per month, - - - - - - \$90 00

"Cr. By cash, - - - - - - 10 80

\$79 20"

The defendant, in his answer, denied being indebted to the plaintiff in any amount whatever, on account of services done

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by the plaintiff in the capacity of engineer and master of the steam-ferry boat, and taking care of flats, from 1st June, 1851, to 15th July, 1851. The defendant stated that, when the plaintiff was employed by him from 1st June, 1851, to 15th July, 1851, the defendant agreed to give him thirty dollars per month, and not sixty, as alleged by plaintiff. He denied having employed the plaintiff between the above periods, as engineer and master : he denied being indebted to plaintiff, and averred that plaintiff owed him the sum of eleven dollars and nine cents, as appeared by the account taken from the account book kept by plaintiff while employed on the steam-ferry boat, &c., and set out the account. The trial was had before the law commissioner, without a jury, who found the defendant was indebted to the plaintiff in the sum of forty-six dollars and forty cents.

The defendant moved for a new trial, and it was granted. On the second trial, the jury rendered a verdict against the defendant for seventy-nine dollars and twenty cents. He again moved for a new trial, which being refused, the case was brought to this court. The judgment was reversed and the cause remanded. In March, 1853, the case was again submitted to a jury, who found for the plaintiff seventy-five dollars and twenty cents. The defendant again moved for a new trial, which being overruled, he appealed to this court.

1. The point relied on for the reversal of the judgment, consists in the refusal of the court below to give the following instruction :

“ The jury are instructed that the plaintiff’s petition does not allege any express contract between plaintiff and defendant, and that, under such petition, plaintiff is only entitled to be allowed in the account, for the time alleged in his petition, according to the value of the services actually rendered.”

It was proper to give this instruction, for the petition does not allege any special contract, and the plaintiff could only recover what his services were reasonably worth ; and unless the court gave instructions covering the ground of this one,

the judgment below should not stand. The first instruction given is as follows :

1. "The jury are instructed, that any inference that the plaintiff continued as engineer, may be rebutted by facts and circumstances, showing that after the 1st day of June, 1851, the plaintiff acted as watchman and not engineer, and that the services rendered were those of a watchman and not of an engineer."

2. "The jury are instructed that, if the services rendered were those of a watchman and not of an engineer, during the time the boat laid up, then the plaintiff is entitled to be allowed in the account between plaintiff and defendant, only such sum as the services were worth, in the absence of an express contract to pay as for an engineer's services. The burden of showing any such contract lies upon the plaintiff."

In the opinion of this court, these two instructions given sufficiently cover the ground assumed in the instruction refused, and therefore these instructions do away with the error of the refusal.

The jury were told that any inference that the plaintiff continued as engineer, may be rebutted by facts and circumstances showing that the plaintiff acted as watchman after the boat laid up, and not as engineer, and that, if the services were rendered as watchman and not as engineer, then the plaintiff can only be allowed such sum as the services were worth, in the absence of an express contract, and that the burden of showing that there was such a contract, was on the plaintiff. An intelligent jury might well understand the law of the case from these instructions, and could easily apply the same to the facts in proof before them.

The judgment of the court below is affirmed, the other judges concurring.

Patrick v. Steamboat J. Q. Adams.

PATRICK *et al.*, Respondents, vs. THE STEAMBOAT J. Q.
ADAMS, Appellant.

1. A witness may be allowed to state the nature of the fracture in a boat caused by a collision, and his impressions derived therefrom as to the position of the two boats when the collision occurred.
2. A party who was an owner of the boat when attached, and when bond was given for her release, is not a competent witness for the boat, even though he may afterwards have sold his interest.
3. A witness testifying as to the general character of a pilot cannot state his knowledge of particular instances of recklessness.

Appeal from St. Louis Court of Common Pleas.

This was an action instituted under the act concerning boats and vessels, by James Patrick and others against the steamboat John Quincy Adams, for damages done to the steamboat Shelby, of which the plaintiffs were owners, by a collision alleged to have been caused by the negligence of the officers and crew of the J. Q. Adams. At the trial, there was much conflicting evidence upon the question of negligence. The plaintiffs read the deposition of William Smith, who testified that he had been a pilot for many years, and knew George Lampton, the pilot at the wheel of the defendant at the time of the collision. Among other questions put to Smith was this: "Is said Lampton a safe, skilful and prudent pilot, or what is his character as a pilot?" His answer, as written in the deposition, was this: "His character, as to his knowledge of piloting, has always been good, *but as regards his recklessness, in many instances to my knowledge, he has not used the care which he should have used.* I have heard him make observations that, meeting boats at night, he would run at them to make them run." To the giving of this answer in evidence, the defendant objected, and the court sustained the objection as to all except that portion in italics, and overruled it as to that portion, to which the defendant excepted.

In the deposition of Henry L. Patterson, read in evidence

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by the plaintiffs, he testified that he saw nothing relative to the collision before it took place. He was a passenger upon the Shelby, and in bed at the time of the collision, but then jumped up, went into the cabin, and after waiting till the escaping steam, and the noise and confusion of the crash had ceased, he went out and looked at the condition of the boats. He then stated the shape of the fracture made in the Shelby by the defendant's bow, and the impression thereby made upon his mind as to the position in which the boats came together. The defendant objected to that portion of the deposition, in which the witness spoke of his impressions as to the manner in which the boats came together, and his reasons therefor; but the objection was overruled and the evidence admitted, to which the defendant excepted.

The defendant offered to read the deposition of Michael E. Lucas, in which he states that, at the time of the collision, he had an interest in the defendant, but that he had since sold out, with the understanding that those who took it should run the risk of the result of the suit. The plaintiffs objected to the reading of this deposition, on the ground that, at the time of the commencement of the suit, Lucas was one of the owners of the defendant. This objection was sustained by the court. When the boat was seized by the sheriff, she was released upon a bond, to which, however, Lucas was not a party.

There was a verdict and judgment for the plaintiffs.

Todd & Krum, for appellant. 1. The admission of the testimony of Smith that Lampton, the acting pilot of the defendant, at the time of the collision, was, to his knowledge, in many instances, reckless, and did not use the care which he should have done, was error. 2. The admission of so much of the deposition of Patterson as gives his impression of the manner in which the boats came together, was error. 3. The rejection of the testimony of Lucas was error. The boat had been released upon a statutory bond which entirely discharged the boat from the claim, and made the parties to the bond alone liable. Lucas was not a party to this bond; nor was there any

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evidence that those who were parties, became such at his request, or that he was under any legal obligation to indemnify them. When he gave his deposition, he had no further interest in the boat, having sold out at the risk of the purchaser.

Glover & Richardson, for respondents. 1. The testimony of Patterson, objected to by the appellant, was competent and relevant. The position of the boats at the time of the collision was material. The witness stated his impression, and the facts upon which it was founded. Both went to the jury together. 4 H. & McH., 63. 9 Conn. Rep. 102. 6 Conn. Rep. 9. 2 Pick. 304. 3 Dana, 382. 18 Ohio, 375. 2. The evidence of Lucas was properly excluded, because he was an owner of the boat at the collision, and at the institution of the suit. A plaintiff may sometimes, under our laws, sell out his cause of action and be a witness; but a defendant is not allowed thus to acquit himself of any connection with the case. 3. The statements of Smith, as to the qualifications of Lamp-ton as a pilot, were competent evidence, although perhaps not responsive to the question.

RYLAND, Judge, delivered the opinion of the court.

From the preceding statement, it will appear, that the only questions which this case presents for the consideration of this court, have their origin in the decision of the lower court, in regard to the admissibility of testimony on the part of the plaintiff, and in regard to the rejection of the testimony of Lucas on the part of the defendant.

1. The objections made by the defendant to the testimony of the witness, Patterson, and which were overruled by the court below, are not valid. The witness describes the injury done to the steamboat *Shelby*, and then gives his impression of the relative position of the two boats, from the wound in the *Shelby*. The fracture which the *Shelby* received might afford a sure means of judging the position at the time of the collision, and what the witness stated on this subject is considered proper and lawful testimony.

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2. The rejection of the testimony of Lucas is also considered by this court as correct. He was an owner of the J. Q. Adams at the time of the collision, and at the institution of this suit, and was *prima facie* liable to the securities in the bond by which the boat was released. This suit was obviously defended for him—for his immediate benefit. His boat was attached; it had been released by bond. Now permit him to prove that the boat was not in fault, and he thereby escapes all responsibility himself. Admit that Lucas had sold his interest, and that, too, with the understanding that his purchasers should run the risk of this suit, he had not sold at the time of the institution of it; and then, when the boat was released on bond, he was, as an owner, bound *prima facie* to those upon whose bond she had been released, to reimburse them the money which they might have to pay on account of such bond. He was then properly considered an incompetent witness.

3. The most important objection is the one taken to the testimony of Wm. Smith. This witness is permitted to give the general character of Lampton, a witness for defendant, as a pilot, in evidence; thus: "His (Lampton's) character, as to his knowledge of piloting, has always been good, but as regards his recklessness, in many instances, to my knowledge, he has not used the care which he should have used. I have heard him make observations that, meeting boats at night, he would run at them to make them run." This statement met with the objection of the defendant; but still the court allowed the following portion of it to be read, viz: "As regards his recklessness, in many instances, to my knowledge, he has not used the care he should have used." In the opinion of this court, this testimony was not admissible. The question in issue was, whether, at the time of collision, there was any fault, which arose from incompetency or unskilfulness of the officers of the boat or any of them. Upon this question, the plaintiff offered to prove the general character of the pilot, and in doing this, his witness was suffered to testify to his own individual knowledge of acts of recklessness of the pilot. The appellant

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did not object to the general character of the pilot being given, and we are not called upon to say whether his general character, as pilot, was proper to be given before the jury or not; but the objection is to this part of the witness' deposition: "As regards his recklessness, in many instances, to my knowledge, he has not used the care which he should have done." Now this evidence is not legal. The witness could not speak of individual knowledge of separate and distinct acts. Were he testifying as to a witness' general character, he could not speak of his own personal knowledge of different acts of the person whose general character was the subject of proof.

But here the pilot is looked upon as a party—at least as the agent of the party; and though a party in a civil suit has been guilty of different improper acts—acts of the same nature of the one which gave rise to the suit, yet, it never was thought competent for the adverse party to prove such acts in the trial of such suit.

An attorney at law being sued by his client for negligence and inattention, and for improper management of his case, is not subjected to the proof of general bad conduct and mismanagement of his clients' cases.

The general character of the pilot here was given, and had the witness stopped at his general answer, the judgment would not have been disturbed, as the appellant, the defendant below, made no objection. But it was an unfair and improper way to speak of special or particular acts of recklessness, or to speak of the witness' own personal knowledge of such. Upon this point, then, and this only, is the judgment of the court below considered erroneous.

The judgment of the court below is reversed, and this cause is remanded, the other judges concurring.

JEROME TIBEAU, Respondent, *vs.* JOSEPH TIBEAU, Appellant.

1. The cancellation or destruction of a deed will not revest the title of the alienee in the alienor, although it may be done by mutual consent and with a view to that object.
2. Law and equity being now blended, an equitable title arising out of a contract for the sale of land is a defence to an action instituted to recover possession of the land.
3. Possession of land under a contract of sale, and payment of the purchase money, is a good defence to an action brought by the alienor for the possession.

Appeal from St. Louis Circuit Court.

This was an action commenced by Jerome Tibeau against Joseph Tibeau. The petition stated that the defendant, in 1835, conveyed to the plaintiff a tract of land in St. Louis county; that the plaintiff, in 1839, deposited the deed for record in the recorder's office of said county; that soon afterwards, it was agreed between plaintiff and defendant, that plaintiff should give defendant a mortgage on said land to secure the payment of certain indebtedness, and that plaintiff authorized defendant to obtain the deed from the recorder's office, in order that the mortgage might be drawn up and executed; that defendant did obtain the deed from the recorder's office, and afterwards said that no mortgage need be executed, but that he would retain the deed until the indebtedness was paid; that plaintiff then supposed the deed had been recorded, but about two years before this suit was brought, he discovered that it had not been; that plaintiff had tendered to defendant the amount of the indebtedness, and had demanded of him said deed, but defendant refused to deliver it up, alleging that he had destroyed it. Plaintiff alleged that he held possession of, and lived upon the land until March, 1851, when he moved off, and defendant unlawfully took possession, and continues to hold it, claiming it as his own. The prayer of the petition was, that the defendant be ordered to deliver up the deed, or if the same had been destroyed, that he be required to convey the

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land to the plaintiff. The plaintiff also prayed judgment for the possession.

The defendant, in his answer, admitted the sale and conveyance of the land to the plaintiff, but denied that the subsequent transaction was a mortgage. He alleged that the plaintiff being in great pecuniary difficulty, besought him to purchase back the land, and that he finally consented to do so, and in payment for the same, he endorsed plaintiff's notes to enable him to raise the money, which notes, he (defendant) afterwards paid according to agreement; that it was agreed between them that the plaintiff should execute a deed reconveying the land, but afterwards, ascertaining that the deed from defendant to plaintiff had not been recorded, it was agreed that the same should be destroyed, with the intention thereby to re-vest the title in the defendant. The answer admitted the plaintiff's possession after the destruction of the deed, but alleged that it was with the permission of the defendant.

At the trial, the plaintiff rested upon the admissions in the answer. The defendant then offered evidence tending to show a sale of the land to him by plaintiff. Joseph Tibeau, father of both parties to the suit, stated that the plaintiff passed a day at his house, and told him that the defendant had paid two debts for him, and he was going to see him, and if he would pay another, he would let him have his land. Louis Tibeau stated that plaintiff told him that he had sold the land to defendant. There was testimony that the plaintiff did not assert any claim to the land, until it began to become valuable. There was evidence that plaintiff made improvements on the land, but no evidence of any improvements made by defendant.

The court refused all the instructions asked by the defendant, and gave the following for the plaintiff:

"There is no evidence before the jury that Jerome Tibeau agreed to the cancellation or destruction of the deed by Joseph to him."

A. P. & P. B. Garesché, for appellant.

Frémon & Reber, for respondent. The instruction given

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by the court was proper. There was no evidence that the plaintiff had consented to the destruction or cancellation of his deed, and in fact no evidence that the deed had been destroyed. But even if it had been specially found that the deed had been destroyed by plaintiff's consent, this would not revert the title in the defendant. The title to things which lie in *livery*, is not destroyed by a destruction of the deed, which is only the evidence of title. It is otherwise as to things which lie in grant. 1 Greenleaf, p. 314, §265. Roberts on Frauds, 249-50. *Botsford v. Morehouse*, 4 Conn. 555. *Jackson v. Chase*, 2 J. R. 84. *Doe, ex dem. Lewis v. Bingham*, 4 B. & Ald. 672. *Bolton v. Bishop of Carlisle*, 2 H. Black. 263. 6 East, 100. 8 Cowen, 71. 7 Wend. 364. A contrary opinion is supposed to be held in some cases in Massachusetts and New Hampshire. *Tomson v. Ward*, 1 N. H. 9. *Farrar v. Farrar*, 4 N. H. 195. *Commonwealth v. Dudley*, 10 Mass. 404. 7 Pick. 105. But we apprehend that an examination of these cases will show that the judgments rested on different grounds than any forced construction of the statute of frauds or fraudulent conveyances will afford. But the appellant may contend that he re-purchased the land of the respondent, and took and held possession of it, and so his purchase was valid, notwithstanding there was no writing to take the case out of the statute of frauds; that he has a good title in equity if not at law. It is conceded that, on a treaty of purchase, the payment of the purchase money, the delivery of possession, and the making of valuable improvements will avoid the plea of the statute of frauds. *Johnson v. McGruder*, 15 Mo. Rep. 370. But in this case, the contract of resale was only proved by rumor, there was no proof of the payment of the purchase money, the defendant admitted that plaintiff was in possession after the alleged resale, and it was proved that *plaintiff* made improvements after that time, and not the defendant. So that there was a total failure on the part of the defendant to make out a case entitling him to call on the plaintiff for a conveyance. The judgment is substantially correct, and for the right party.

SCOTT, Judge, delivered the opinion of the court.

The law was correctly stated by the plaintiff that the cancellation or destruction of a deed conveying land will not revest the title of the alienee in the alienor, although it may be done by mutual consent and with a view to that object. But we do not see how this principle affects the defendant. Admitting that the legal title was in the plaintiff, the pleadings and evidence in the cause show that the defendant relied on the defence that there was such a part performance of a parol agreement respecting the sale of the land in controversy, as will entitle him to a judgment in this action. Law and equity being now blended, an equitable title arising out of a contract for the sale of land, is a defence to an action instituted to recover the possession of the land, the subject of the contract.

The instruction given by the court that there was no evidence before the jury that the plaintiff agreed to the cancellation of the deed by the defendant to him, only impliedly affected the point in controversy, as the destruction of the deed, without the consent of the plaintiff, would only be a circumstance showing that he made no contract respecting the land. But the error of the instruction is, that it took the case from the jury. The jury was sworn to try the issue, and there were facts and circumstances from which they might have found the defence set up by the defendant. The jury should have been directed that, if there was a contract for the sale of the land, and the purchase money was paid, and possession given up or delivered in pursuance to it, they ought to find for the defendant.

The views here presented are equally applicable, whether this be regarded as a suit to recover the possession of the land in dispute, or to compel a delivery of the title deed upon the payment of the money to secure which the title paper was left or deposited with the defendant.

The other judges concurring, the judgment will be reversed and the cause remanded.

Boyle v. Skinner.

BOYLE, WEST & HARDY, Appellants, vs. SKINNER, Respondent.

1. The new practice (except the 25th article) is not applicable to the proceedings in causes taken from justices of the peace.
2. When a note is payable to J. A. H., and there is a firm composed of J. A. H. and others, doing business under the style of J. A. H., but no evidence is offered to show to whom or on what account the note is given, it will be presumed to have been given to J. A. H. individually.

Appeal from St. Louis Law Commissioner's Court.

N. Holmes, for appellants. 1. "James A. Hardy" being found to be a firm composed of the plaintiffs, no assignment by James A. Hardy, as an individual, was necessary in order to vest the title to the note in the plaintiffs. 2. The plaintiffs are entitled to judgment in this court.

J. W. Skinner, for respondent.

GAMBLE, Judge, delivered the opinion of the court.

This action commenced before a justice of the peace, and of course there are no pleadings in the record. The note filed with the justice, at the commencement, is a negotiable note, made by Skinner, payable to the order of James A. Hardy. The ground upon which the three plaintiffs sue is, that they composed a firm, doing business under the style of James A. Hardy, but there is no such allegation by pleading. When the case was taken to the court of the law commissioner, by appeal from the justice, it was submitted to him without a jury, and he, regarding the case as one governed by the code of practice, found the facts and pronounced the law thereon. He found that the defendant made the note payable to James A. Hardy; that the plaintiffs composed the firm of James A. Hardy at the time the note was made, and that there was no assignment or indorsement on the note. Upon the facts thus found, he de-

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clared the law to be that, on this note, the legal owner should sue in his own name, and that the legal title to the note appears on its face to be in James A. Hardy. There were no instructions asked, or declarations of law requested by either party upon any point arising upon the evidence, nor is there any statement of the evidence in any bill of exceptions. The case is brought here because it is supposed the law commissioner erred in declaring the law upon the facts found to be that the suit should be in the name of James A. Hardy.

1. It is proper here to state the views we entertain in relation to the practice to be pursued in cases taken by appeal from a justice of the peace. The 6th section of article 30 of the code provides, in these words: "Nor shall this act, except the 25th article, apply to proceedings or actions before justices of the peace." An appeal from a justice of the peace takes the case up to the appellate tribunal just as it stood before the justice, and the trial there is upon the whole merits as it was below. It is the same action that was before the justice. The code is not to be used on the trial of such case, on appeal, except the 25th article, which establishes rules of evidence. This view is founded entirely upon the language of the 6th section of the 30th article of the code. The proceedings in the court trying a case brought by appeal from a justice of the peace, will therefore be according to the old practice before the code was adopted.

2. In the present case the practice just indicated as the correct practice, not having been pursued, we might dispose of the case without determining the question raised by the finding of the court below, but it is presented in a form in which it may be decided without difficulty. The note was made payable to James A. Hardy. A firm existed at the time, doing business in the name of James A. Hardy. No evidence is given to show to whom or on what account the note was given. The question upon these facts is, to whom shall the note be presumed to have been given? The law commissioner says to James A. Hardy, individually. We approve the conclusion of

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the law commissioner. *United States v. Binney*, 5 Mason's Rep. 183. *Etheridge v. Binney*, 9 Pick. Rep. 274. The judgment is, with the concurrence of the other judges, affirmed.

HOUGHTALING, Plaintiff in Error, vs. BALL & CHAPIN, Defendants in Error.

1. It is error to instruct that a plaintiff cannot recover, if he offers any evidence whatever tending to establish his cause of action.
2. The fact that wheat contracted to be sold and delivered in Illinois is to be paid for on its arrival in Missouri, will not subject the contract to the operation of our statute of frauds.
3. If a party in our courts relies upon an Illinois statute of frauds, the burden is upon him of showing the existence of such a statute.
4. Whether there has been a delivery or not, so as to take a case out of the statute of frauds, is a question of fact to be passed upon by a jury under the direction of the court.

Error to St. Louis Circuit Court.

J. A. Kasson, for plaintiff in error. 1. There was evidence of a delivery and acceptance which should have gone to the jury. *Dodsley v. Varley*, 12 Adolph. & Ellis, 634. *Elmore v. Stone*, 1 Taunt. 458. Story on Sales, §277. Story on Contracts, 513. 2 Kent's Comm. 499. 2. But if there was no delivery, the contract, having been made in Illinois, was not subject to the operation of our statute of frauds. The *lex loci contractus* controls. Story's Con. of Laws, §242 (a,) 261, 262, 285. If the defendant claims the protection of an Illinois statute, he must show its existence.

Knox & Kellogg, for defendants in error. The contract established by the plaintiff was manifestly void, as being within the statute of frauds. R. C. ch. 68, sec. 6. There never was a delivery of the wheat to the defendants. As to what constitutes a delivery, see Story on Con. 252, sec. 13. Chitty on Con. 7 Am. ed. 391. Nor is it material in this case whether

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the statute of frauds has ever been adopted in the state of Illinois, where this contract was made. See Law Magazine, vol. 49, No. 99, for May, 1853, p. 80. *Jerome v. Brown*, 22 vol. Law Journal, N. S. C. B. p. 1. Story on Conflict of Laws, sec. 262, p. 391. 10 Bingham, 376.

SCOTT, Judge, delivered the opinion of the court.

The plaintiff's petition stated that he sold to the defendants two thousand bushels of wheat, at the price of one dollar and five cents per bushel, to be paid for upon the arrival of the wheat at St. Louis, to the agents of the plaintiff; that the wheat was sold to the defendants and delivered to their agent at Chicago, in the state of Illinois, who was to ship the same to St. Louis; that the wheat was shipped to St. Louis, and that the defendants refused to receive it and pay for it. The answer of the defendants denied all the material facts set forth in the petition. After the plaintiff had offered some testimony conducing to establish his cause of action, the court instructed the jury that there was no evidence that would warrant the jury in finding a verdict for the plaintiff, upon which the plaintiff submitted to a nonsuit.

1. As there was evidence in support of the plaintiff's action, the instruction should not have been given. The jurors were the judges of the weight of evidence. If there was a question of law upon the testimony in the cause, the facts should have been hypothetically stated in an instruction, and the law applied to them. It is obvious that, as the case comes from the court below, there is no question of law for this court to decide. None was made, and, so far as the record is concerned, we are utterly at a loss to ascertain the point on which the cause was determined in the court below.

2. It is not perceived how the statute of frauds could affect the contract, as stated in the petition. It is alleged that the wheat was sold and delivered. If so, the statute had nothing to do with the case. There being a delivery of the article sold,

the contract was taken out of the operation of the statute. The allegation that the payment was to be made upon the arrival of the wheat at St. Louis, serves only to designate the time of payment, and, by no means, subjects the contract to the operation of the laws of Missouri. The laws of Illinois alone operated on the agreement.

3. The courts of this state will not take judicial cognizance of any of the laws of our sister states, at variance with the common law; but upon common law questions, the legal presumption is, that the common law of a sister state is similar to that of our own. *Wilson v. Cockrill*, 8 Mo. Rep. 7. This principle would throw the burden of proving the Illinois statute, if it were necessary, on the defendant.

4. As to the delivery, it may be remarked, that it is a question of fact to be found by the jury, under the direction of the court.

The other judges concurring, the judgment will be reversed and the cause remanded.

SYBERT, Respondent, vs. JONES, Appellant.

1. A party sued upon a note, who relies upon the defence that it was given for a wager upon an election, under section 10 of the act concerning "gaming" (R. C. 1845) must state in his answer, not only that the election was one authorized by the constitution and laws of the state, but what particular election it was, between whom pending, &c., or he will be precluded from giving evidence on the subject.

Appeal from St. Louis Law Commissioner's Court.

Cline and Thompson, for appellant.

A. H. Buckner, for respondent.

RYLAND, Judge, delivered the opinion of the court.

This was an action brought by Sybert, as indorsee of Charles H. Ashby, on a promissory note, against the defendant, Jones,

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in the law commissioner's court. The defendant, in his answer, states that the note sued on was given on the 31st of July, 1852, by the defendant to said Ashby, "upon a bet made upon the August election, and was wholly without consideration, and that there was never any consideration for the same, which the above named plaintiff well knew at the time he received the same from said Ashby; that said note was transferred by the said Ashby to the said plaintiff, without valuable consideration and for the purpose of collection, &c. The plaintiff never paid any valuable consideration for said note and was well aware at the time of receiving the same, that it was given by said Jones upon a bet upon the August election of 1852, and wholly without any legal consideration."

Upon the trial, the defendant offered to prove that the note was given by him as a "bet or wager on the August election." The plaintiff objected to the introduction of evidence concerning any particular election, as the defendant's answer did not specifically refer to any; nor did it refer to any election authorized by the constitution and laws of the state of Missouri. The court sustained the objection, and rejected the testimony, and the defendant excepted. The defendant then offered to prove that the note was given as a bet or wager on the August election, 1852, for state and county officers; an election authorized by the constitution and laws of the state of Missouri. The plaintiff objected, and his objection was sustained, and the defendant excepted. The defendant then moved the court for permission to amend his answer, so as to state that said August election was an election authorized by the constitution and laws of the state of Missouri. The court overruled this motion, and refused to allow the amendment, to which the defendant also excepted. The defendant then offered to prove that said note was given as a bet or wager, and without consideration. The plaintiff objected; the court sustained the objection, and judgment being rendered on the note for the plaintiff, the defendant moved for a new trial, which was refused him, and he brings the case here by appeal.

The 10th section of the act concerning gaming, (R. C. 1845, p. 541,) declares that bets and wagers on any election authorized by the constitution and laws of this state are gaming, within the meaning of said act.

1. The answer does not state, specifically, what election was pending, nor does it set out the particulars of the bet, as between whom the election was pending, nor what the bet was about. The evidence offered was of too general a nature; it did not help out the answer, nor, indeed, did the proposed amendment help the defence any. It was the duty of the defendant, who relied upon the statute of gaming, to state, specifically, the facts constituting the defence. If the note was given for a wagering consideration, rendered void by our act concerning gaming, he should have stated how it originated. If it was a wager upon an election authorized by our constitution and laws, he should have stated what election, between whom it was pending, and the particulars of the transaction. It is not sufficient to allege that the note was given for a bet or a wager on an election, nor on the August election of 1852, for state and county officers, which election was authorized by the constitution and laws of this state. The court below did right, then, to reject the offered evidence, and to refuse permission to amend the answer, when the amendment proposed would not have made the answer any better.

Loose as the present system of pleading under the practice act is, still the parties must state the facts constituting the cause of action and the defence; and it will not answer to say in defence, that the note sued on was given on a bet or wager on the election.

The judgment of the court below is affirmed, the other judges concurring.

Taylor v. Ulrici.

TAYLOR & WIFE, Respondents, vs. ULRICI & WIFE, Appellants.

1. P. by deed of gift, conveyed the eastern half of a lot of ground to his daughter, E. Afterwards, by his last will, he devised the western half to his daughter, T. P. really owned but an undivided half of the lot. The other undivided half belonged to his children in right of their deceased mother, by virtue of the provisions of a marriage contract. E. did many acts recognizing the validity of the will, such as conveying away property devised to her, &c. T. instituted a proceeding in the nature of a bill *quia timet*, to be quieted in her title to the portion of the lot devised to her. *Held*, such a proceeding could not be maintained, under the circumstances.

Appeal from St. Louis Circuit Court.

E. & B. Bates and *T. Polk*, for appellants. 1. The court erred, in finding that the facts in evidence showed an election by Ulrici and wife to take under the will, in any such manner as to bar them from claiming their rights otherwise acquired. The deed and will are to be taken together, and by them Gabriel made a complete division of his property among his children. If there was any election by the appellants, it was an election to stand by the disposition of Gabriel Paul, whether made by deed or will, or both. 2. This proceeding being purely equitable, the plaintiffs should have been compelled to do equity before receiving equitable relief. If then the title to the western portion of the lot was vested in them, the title to the eastern portion should have been vested in the defendants. The court had power to do complete justice between the parties, even though, in so doing, equitable relief was given to the defendants, without a cross bill. Story's Eq. Pl. §313, §394; also note 1, p. 314, and authorities there cited. *Fife v. Clayton*, 13 Vesey, 546. *Mortimer v. Orchard*, 2 Vesey, 243. *Ayliffe v. Murray*, 2 Atk. 59. *Patison v. Hull*, 9 Cow. 747. Walker's Ch. Rep. 170. 2 Schoales & Lefroy, 707, 718. If, however, the court had no power to give the defendants relief, then the relief sought by the plaintiffs should have

been refused. 3. Even if the defendants had made an election, there was no ground for the relief asked by the plaintiffs. There was no evidence of any intention to disturb the title of the plaintiffs, and if there had been, such an intention would have been futile, because the defendants had no title. The marriage contract did not operate to vest in Mrs. Paul or her children any title to property acquired by her husband in his life-time, and during the marriage. 4. The court could not compel an election against a *feme covert*. 2 Story's Eq. 359, §1097. 3 Mylne & Craig, 171.

Haight & Shepley, for respondents. This case depends upon the doctrine of election. The principle is, that no person shall claim under and in opposition to the same instrument. A party shall not claim under an instrument, without giving full effect to that instrument, as far as he can. Worthington on Wills, 444. Election is peculiarly a subject of equity jurisprudence. 2 Story's Eq. 341 to 360. *Dillon v. Parker*, 1 Swanston's Rep. 359. If Ulrici desired any relief against the plaintiffs, he should have filed a cross bill. He was not entitled to it upon his answer, which is nothing more than a plea in bar. 1 Barbour's Ch. Practice, 126. Lubé's Eq. Pl. ch. 4, sec. 4, p. 89. Cooper's Eq. Pl. 85. Mitford's Pl. *Hare v. Collins*, 1 Hogan, 193. *Patison v. Hull*, 9 Cow. 747, 756. 11 Wheat. 446. Walker's Ch. Rep. 170. 1 Gilm. 470. 4 Ala. Rep. 452. *Troup v. Haight*, Hopkins' Rep. 239. *Talbot v. McGee*, 4 Monroe, 375. 2 J. J. Marsh. 443. 6 Monroe, 419. 2 Litt. 55. 3 Stewart (Ala.) Rep. 233. The case cited in 2 *Schoales & Lefroy*, is not in point. There relief was given as between *co-defendants*. Lord Eldon says: "Where a case is made out between defendants, by evidence arising from *pleadings* and *proofs* between plaintiffs and defendants, a court of equity is entitled to make a decree between defendants." The same rule has been followed in this country. 1 Paige, 268. 1 Bland, 404. In Kentucky and North Carolina, however, they hold differently. 4 Monroe, 375. 1 Dev. & Batt. Eq. Rep. 199.

SCOTT, Judge, delivered the opinion of the court.

This is a proceeding which, under the old system, would be termed a bill *quia timet*, the object of which is, to quiet the plaintiffs in the possession of lands which they now enjoy. Gabriel Paul and Louisa Chouteau, the father and mother of plaintiff and defendant's wives, were married on the 28th March, 1818, and prior to and in contemplation thereof, they made a contract by which it was stipulated that all the property and effects which should come to either of them during its continuance, should, in the event of death, without children, go to the survivor; if there should be children, then the portion of the party dying should descend to them in equal shares. A community having been established, the share of each, under the contract, was one half.

On the 17th June, 1818, during the marriage, Gabriel Paul purchased of René Paul a lot between Olive and Locust streets, fronting on Main, and running east to the river, which will be known as the Tontine property, for the purposes of this case.

In November, 1832, Louise, the wife of Gabriel Paul, died, leaving him survivor and four children, Estelle, wife of Ulrici, the defendant; Therese, wife of Taylor, the plaintiff; Adolph and Aglai. Aglai died in youth, without children.

On the 29th July, 1841, Madame Therese Chouteau, the grandmother of the children just above named, conveyed to Gabriel Paul, for life, remainder in fee to his children, three lots, one known as the Alexander House, one the Paul House, and the third a lot fronting on Main street, between Market and Walnut streets. These lots were immediately entered upon by G. Paul, and extensive improvements were made upon them.

On the 5th day of December, 1843, Gabriel Paul, for love and affection, conveyed the eastern portion of the Tontine property to his daughter, Estelle, the wife of the defendant, Ulrici. The deed was with a warranty, and the property conveyed by it was subject to the provisions of the marriage con-

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tract between Paul and his wife, as it was acquired during the marriage. Ulrici, in 1849, erected a new and valuable building upon this lot.

On the 9th day of August, 1846, Gabriel Paul died, having made a last will and testament. By this he disposed of all the property that belonged to him amongst his three children, Estelle, Therese and Adolph. To Estelle, among other lands and lots, he devised the Alexander House, mentioned before, as being conveyed by Madame Therese Chouteau to G. Paul and his children. To his son, Adolph, among other things, he gave the lot fronting on Main street, between Market and Walnut, which was also a part of the property conveyed by Madame Chouteau. To Therese, with other property, he divided the western portion of the Tontine property, running from Main street to the alley. This property was subject to the provisions of the marriage contract between Gabriel Paul and his wife, and after the fire, in 1849, was covered with buildings by Taylor, the plaintiff, costing some \$22,000.

During the latter part of the year 1847, Taylor, the plaintiff, demanded of Ulrici his share of the rents of the Tontine property, held by Ulrici and wife, under the deed of gift above mentioned from G. Paul.

On the 11th January, 1848, R. W. Ulrici and his wife, defendants, by a deed conveyed all their interest in the Tontine property, including as well that which Taylor and wife had, under the will, as that held by themselves, under the deed of gift, to A. C. M. Ulrici, the father of the defendant, of that name, who, immediately thereafter, reconveyed the same to the said R. W. Ulrici.

Many deliberate acts were done by Ulrici and wife, recognizing the validity of the will of G. Paul; such as conveying away the property devised to his wife by the will, and reciting in the conveyances that it was devised to them, receiving legacies and distributive shares, &c.

R. W. Ulrici knew of the improvements made by Taylor on his wife's portion of the Tontine property.

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Estelle and Therese were married before their father died, who acquired, after his wife's death, other real estate of considerable value, which was devised among his children.

The petition of the plaintiffs prayed that Ulrici and wife might be declared to have elected to take under the will of G. Paul, and that they be compelled to abide by the same, and that all claim of Ulrici and wife to that portion of the Tontine property devised to Therese, wife of Taylor, may vest in her absolutely; and in case it should be found that no election had been made, that they be required to make one, whether they will take under and according to the will.

Ulrici and wife, in their answer, submit to abide by the will, if the title to their portion of the Tontine property, derived from G. Paul, by deed of gift, should be confirmed to them. They insist that the deed and will should be taken together, and the two instruments regarded as the disposition made by Paul of his entire estate. Adolph Paul, the son, a defendant, is willing to abide by the will.

The court declared, as an inference from the facts found, that there was no connection between G. Paul's will and the deed to Estelle, the wife of Ulrici, for the eastern portion of the Tontine property; that the children of Mrs. Paul had an equitable interest in one half of the Tontine property, it having been acquired during her marriage with G. Paul; that Ulrici and wife had elected to take under the will, and decreed that all their title in that portion of the Tontine lot, devised to Therese, wife of Taylor, vest in said Therese.

1. The plaintiffs' bill is one which, under the old system, was styled a bill of peace. Courts of chancery have, unquestionably, a jurisdiction to quiet men in the possession and enjoyment of their estates, when a suitable case is presented for that purpose. But the object of this proceeding is not to be quieted. The defendants, Ulrici and wife, are willing to acquiesce in the disposition of his entire estate, as made by G. Paul in his will and the deed of gift, but object to the partial interference sought by the plaintiffs, which asks the settlement of the rights

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of the parties under the will, only disconnected with all consideration of deed of gift.

It cannot be disguised that the design of the plaintiffs is, to have the disposition of the estate made by the will established, in order that, in claiming their share of the Tontine property, conveyed to Ulrici's wife by the deed of gift, they may incur no risk of losing the share of that property which they derived from the will. The Tontine property having been acquired during G. Paul's marriage, on the death of his wife, one half of it, according to the terms of the marriage contract, belonged to their children. That entire property is given to Ulrici and Taylor's wives. Ulrici's wife obtained her part by deed, and the part of Taylor's wife came by the will. Then Taylor and wife ask that the defendants may be compelled to abide by the will, which will prevent them from claiming any share in the portion of the Tontine property owned by Taylor's wife, while the share of Ulrici and wife, not being derived from the will, will be exposed to the claim of Taylor and wife. So that, it appears, so far from this being a procedure in the nature of a bill of peace, it is one to enable the plaintiffs to commence a litigation without risking a right, which they should justly risk, in the event they should seek to disturb the disposition of his property, as made by Gabriel Paul.

We do not feel that we are authorized to decide the rights of the parties in this form of proceeding. We determine that no case is presented which warrants the equitable interference of the courts. If the deed has no connection with the will, as has been said, cannot we see the injury we do the defendants by interfering to the extent asked by the plaintiffs.

The deed and the will make an entire disposition of G. Paul's estate among his children. In that disposition, he has given property belonging to Taylor and wife to Ulrici and wife, and he has given property belonging to Ulrici and wife to Taylor and wife. Now where is the equity in confirming Taylor and wife in their possession, vesting in them Ulrici and wife's title to their land, and leaving Ulrici and wife exposed to the demand

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of Taylor and wife against their property? That such a consequence would follow from the interference of a court of equity, is a reason why it should not interpose its aid in the manner required. The plaintiffs say that Ulrici and wife cannot have affirmative relief in this action; that they cannot set up their deed, and that it is against the rules of chancery practice. Now, as the deed of gift to Ulrici's wife is in the cause, if it cannot be used, does it not follow that this is no case for the equitable interference of a court? The same liberality of intendment which found that Ulrici and wife acquiesced in the will, might have found that Taylor and wife acquiesced in the deed, notwithstanding his claim for rent. As Ulrici and wife are willing to submit to the disposition of his estate made by G. Paul, and as the plaintiffs, under the pretence of being quieted in their possession, are seeking to protect themselves with a shield, which will enable them to assail the rights of others with impunity, no ground is furnished for the interposition of a court of equity.

The case, as presented here, with the decree below, shows that it has not been treated as one to compel an election. The court below found that there had been an election, and decreed accordingly. As a remedy to compel an election, which we regard as of equitable cognizance, the objections urged against it, as a mode of redress, in the nature of a bill *quia timet*, equally apply. We do not consider that the defendants have asserted a claim to the property held by the plaintiffs, in such a manner as would require a court to compel them to elect, in a case otherwise suitable. They are willing to be quiet if the plaintiffs will be so. If they have asserted a claim to the property in the possession of the plaintiffs, it was only in response to one asserted by the plaintiffs to the property held by them. We determine no rights between the parties; we only declare that the plaintiffs are not entitled to the advantage they seek by this action.

Judge Ryland concurring, the decree is reversed, and the bill dismissed. Judge Gamble not sitting.

Vasquez v. Richardson.

VASQUEZ *et al.*, Plaintiffs in Error, *vs.* RICHARDSON, Defendant in Error.

1. A deed conveying "a tract of land eight arpens in front upon the depth of forty," with no proof of its locality, was held not sufficient to pass the specific land claimed by the plaintiff.
2. An administration sale, under the act of July 4, 1807, will not be held void for the non-production of the advertisement required by law, nor for the want of the administrator's affidavit that he did not become the purchaser. Under that act, it was not necessary that there should be a confirmation of the sale or a deed.
3. Fraud in the sale will not be presumed from the mere fact that the purchaser at the sale afterwards conveyed the property to the administrator.

Error to St. Louis Court of Common Pleas.

This was an action of ejectment, commenced in 1847, to recover the northern portion of a tract of sixteen by forty arpens of land, confirmed to Benito Vasquez. The plaintiffs claimed under a deed from Benito Vasquez and wife to their children, dated July 4, 1807, in which the land conveyed was described as "a tract of land eight arpens in front upon the depth of forty, and as the same exists according to the lines of the figurative plan." The plaintiffs offered in evidence the concession and confirmation to Benito Vasquez, accompanying which was a plat, which they claimed to be the figurative plan referred to in the description in the deed. They then offered in evidence a deed, dated February 17, 1804, from Mrs. Julia Vasquez, wife of Benito, to Wm. Hebert Lecompte, conveying three by forty arpens in the White Ox prairie, bounded north and south by lands of Benito Vasquez; a deed from Benito Vasquez and wife to Francis Valois, dated February 18, 1804, for two arpens by forty, bounded north by lands of William Hebert Lecompte, and south by lands of Vasquez; and a deed from Vasquez and wife to Andrew Landreville, dated February 21, 1804, conveying two by forty arpens, bounded north by Valois, and south by Antoine Roy. The plaintiffs asked the court to instruct the jury that the deed under which they claimed passed the land in controversy, if the three deeds to

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Lecompte, Valois and Landreville were duly executed and conveyed the southern seven arpens of the tract conceded and confirmed to Benito Vasquez ; which instruction the court refused to give.

The defendant claimed under two sales made by Joseph Phillipson, as administrator of Benito Vasquez, under the law of July 4, 1807. The proceedings in relation to these sales and the objections to them are stated in the opinion of the court.

J. E. Munford, for plaintiffs in error. 1. The deed from Benito Vasquez and wife to their children is not void for uncertainty of description. The survey of the tract confirmed to Vasquez, as shown by the figurative plan, was for fifteen by forty arpens in the White Ox prairie, bounded south by Roy. The deeds to Lecompte, Valois and Landreville conveyed seven by forty arpens, bounded south by Roy, leaving the northern eight by forty arpens still remaining, at the date of the deed under which the plaintiffs claim. In addition to this, the deed is dated at White Ox prairie. *Hart v. Rector*, 7 Mo. Rep. *Landes v. Perkins*, 12 Mo. Rep. *Ashley v. Green*, 8 Mo. Rep. 2. There was evidence tending to show fraud in the administration sale, which should have gone to the jury. 3. The deed from Phillipson, as administrator, to Mrs. Vasquez, is void for uncertainty of description. The language of the deed is, "A certain piece of land, situate in the White Ox prairie, containing $7\frac{1}{2}$ arpens in front, by 40 in depth, adjudged to the widow Vasquez." Greater certainty of description is necessary in deeds executed by officers of the law than in voluntary deeds. 4. The deeds from the administrator to Mrs. Vasquez are void, because there is no copy of the advertisement of the sale, nor was there any confirmation of the sale. 8 Met. 363. 20 Wend. 241. 15 Pick. 423. 13 Wend. 464.

E. & B. Bates, for defendant in error.

SCOTT, Judge, delivered the opinion of the court.

1. The description of the premises in controversy, supposed to be conveyed to the plaintiffs, is in these words : "A tract

of land eight arpens front upon the depth of forty, and as the same exists according to the line of the figurative plan." Upon this alone, without any extrinsic proof of its locality, the instruction called upon the court to declare the law to be, that the instrument was operative to convey to the plaintiffs the land claimed by them in their declaration, if the jury should find the deeds given in evidence, to Leconte, Valois and Landreville, were duly executed, and conveyed seven arpens of the southern part of the land conceded to said Benito Vasquez, and subsequently confirmed. These deeds conveyed seven arpens of land, by forty, adjoining each other, bounded on the south by Antoine Roy, and north by the land of Benito Vasquez, in White Ox prairie, running in depth from the hills or bluffs to the Mississippi. There is no evidence of the locality of Antoine Roy.

It is evident that this case is wholly unlike those in which it has been held that parol evidence was admissible to show that the description of land in a deed was understood, and that it was known by the terms by which it was described. Now, without proof, it was impossible to ascertain what land passed by the deed. Such evidence, if it existed, might have been produced, but the instruction requires the court, as a matter of law upon the deed itself, without any other evidence than the existence of deeds which shed no light on the subject, to declare that, by the description given, the land in the occupation of the defendant passed to the plaintiffs. The instruction was wrong in principle, if there was any evidence of the identity of the land, because it invaded the province of the jurors, who are the sole judges of the weight to be given to the evidence produced on the trial in relation to the locality of the land conveyed.

The plaintiffs being heirs at law of Benito Vasquez, it is insisted that, although their title, under the paper evidence, may fail, yet they are entitled to the land by the law of inheritance, as the proceedings of the administrator, in the sale of the estate for the payment of debts, were conducted with such irregularity, and so affected with fraud, that they were

void and inoperative to pass away the title derived by succession from Benito Vasquez, their father.

2. The proceedings which resulted in a sale of the land in controversy, took place upwards of forty years since, but a few years after the transfer of Louisiana to the United States. The Spanish law was then in force, unless where it had been superseded by our own institutions and legislation. Most of the papers forming a part of the procedure, are in the languages then used by the old inhabitants of the territory. It would be hard, under these circumstances, to test the legality of these judicial proceedings by a system of law whose introduction dates from a period long subsequent. The observations which were made in the beginning of the opinion, in the case of *Landes v. Perkins*, 12 Mo. Rep. 254, are applicable to the objections urged against the validity of the sale decreed by the general court for the payment of the debts of the estate of Benito Vasquez. That court, undoubtedly, had jurisdiction of the subject matter. The act of July 4, 1807, empowered the general court to order the sale and conveyance of the real estate of intestates, upon the filing an account, upon oath, of the debts, with the inventory, appraisement, and lists of sales of the estate of the deceased. Advertisements of the time and place of sale were required to be made out by the clerk, and the proceedings were to be brought to the next term of the court after the sale was made, with an oath or affirmation that such administrator did not become a purchaser of such land himself; that they were not purchased for his use, and that he was in no wise interested in the purchase thereof. The first petition for a sale was accompanied with an inventory, sale bill and an account of debts, supported by an affidavit of its truth. An order of sale was decreed, and the clerk was directed to make out advertisements giving notice of the time and place of sale. The sale was made, and afterwards, the administrator made the oath required by law. This proceeding was for the sale of seven by forty arpens in the White Ox prairie.

Subsequently, another petition was filed for the sale of one

and a half arpens in the White Ox prairie ; land belonging to the estate which had come to the knowledge of the administrator since the first sale. There was an order for the sale of this land. It was sold and a conveyance was executed, but it does not appear that any return was ever made, or that the affidavit required by law was ever filed by the administrator.

The law, at that time, did not require a confirmation of the proceedings of the administrator in the sale of land to be made by the court, nor is there any provision respecting the making of a deed to the purchaser.

As to the first sale, it is in all respects conformable to law, except that the affidavit of the administrator that he did not become the purchaser, was not made within the time required by law. The sale of the one and a half arpens was a continuation of the former proceeding, and is within the principle of the case of *Frye v. Kimball*, 16 Mo. Rep., where there were orders of sale at different times, under one account and inventory.

The advertisement required by law was no part of the record. No way was devised for its preservation. The statute did not require any deed. The sale was made prior to the introduction of the common law and the enactment of the statute of frauds and perjuries. Under these circumstances, after such a lapse of time, to require the production of a fugitive paper, in order to sustain a judicial proceeding, would subvert most titles resting on such proceedings for their support. These constructions are applicable to the want of the affidavit of the administrator that, at the second sale, he did not become the purchaser of the land, and that he was not interested therein.

As to the description of the land contained in the two deeds of the administrator, it will be very unsafe, at this distance of time, to pronounce that it rendered them void for its uncertainty. The description is such as would serve, with the aid of extrinsic evidence, to locate the land. If lands are properly described in the notice of sale, no injury would result to an estate from the vagueness of the description contained in the

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deed. This is a matter between the purchaser and the administrator. The description of the land in the deed of the administrator is more definite than that in the deed of Vasquez and wife to the plaintiffs. There is nothing in the description of the land alleged to be conveyed to the plaintiffs, taken in connection with the existence of the facts assumed in their first instruction, which would enable a court, as a matter of law, to declare that the land in controversy passed by it.

3. There is no proof of fraud in the administrator's sale, as maintained by the counsel for the plaintiffs. Fraud is not to be presumed, and without proof of it, either by positive evidence, or by circumstances from which it may be inferred, it cannot be supposed to exist. The mere circumstance of the the subsequent sale by the purchaser to the administrator is not sufficient to warrant the assertion that it did exist. The greater portion of the land, conveyed by the purchaser to the administrator, was transferred by a deed which bore date upwards of fourteen months from the time of the sale. Nor was the existence of fraud made a question by any of the instructions offered on the trial below.

Judge Ryland concurring, the judgment is affirmed. Judge Gamble not sitting.

TEMPLETON & MCKEE, Appellants, vs. WOLF, Respondent.

I. It is error to refuse to permit a plaintiff to take a non-suit.

Appeal from St. Louis Law Commissioner's Court.

J. W. Skinner, for appellants.

GAMBLE, Judge. In this case, the court having given certain instructions to the jury, after the evidence was closed, the plaintiffs asked that they might be allowed to take a nonsuit,



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but the court refused to permit it, and a verdict and judgment were given for the defendant.

The statutes of this state have always recognized the right of a plaintiff to take a nonsuit, and have limited its exercise to the time previous to the retiring of the jury to consider their verdict. This practice is not affected by the code, being entirely consistent with it.

The judgment is reversed, and the cause remanded, the other judges concurring.

CARROLL, Appellant, vs. PAUL'S ADMINISTRATOR, Respondent.

1. The supreme court has repeatedly declared that it will not reverse for the refusal to give instructions, when those given fully present the case to the jury.
2. A general stipulation that the minutes of the testimony of a witness on a former trial may be read in evidence, extends to any number of subsequent trials; nor is it necessary that the stipulation should have been filed among the papers in the cause.

Appeal from St. Louis Court of Common Pleas.

This was an action of *assumpsit*, begun by Carroll against Paul in 1847, and after the death of Paul, revived against his administrator. A statement may be found in the opinion of this court, when the case was formerly here. (16 Mo. Rep. 226.) On the last trial below, the respondent read in evidence the minutes of the testimony of John Barr on a former trial, first producing from his own possession a stipulation which is set out in the opinion below. The appellant proved that this stipulation was entered into at a former trial, and that the testimony of Barr had been read in evidence under it. He excepted to the admission of the testimony at the present trial, for the reason that the stipulation was only intended for the former trial, and for the further reason that it had not been filed in the

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case. Barr testified that Paul rendered an account marked "O" to Carroll, which showed a balance in his favor, and that Carroll promised to pay it, although he made some complaints. The account, marked "O," was then read in evidence, to which the appellant excepted, for the reason that it was not identified as the account referred to by Barr. There was a judgment for the defendant, from which the plaintiff appealed.

Krum & Harding, for appellant.

Britton A. Hill, for respondent.

RYLAND, Judge, delivered the opinion of the court.

This case was before in this court, and was reversed and remanded at the March term, 1852. Upon the last trial, the defendant had a verdict, and the plaintiff appeals. The grounds of complaint upon which the appellant urges the reversal, consist in the admission of evidence, and the giving and refusing to give instructions. So far as respects the action of the lower court, in regard to the instructions given, as well as those refused, it is deemed sufficient for this court to say that, in looking over the facts of the case, and the law applicable thereto, we consider that the court below very fairly presented the law of the case to the jury.

1. The case was submitted to the jury upon instructions, in accordance with the decision of this court, at March term, 1852, and reference is had to the opinion then delivered. This court has again and again declared, that we will not reverse a judgment for not giving instructions, when we see that those given fully present the law of the case upon the matters in evidence before the jury. We shall not, therefore, any further notice this ground of complaint.

2. The principal matter of difficulty in the case, as it now comes before the court, consists in the admission of the evidence of the former witness, Barr, and the admission of the account "O." The appellant insists that the court erred in

admitting this testimony ; and the defendant contends that it was properly admitted, and relies upon the stipulation of the counsel, as authorizing the ruling of the court in regard to the evidence.

After the plaintiff had closed his case, the defendant offered to read the report of the testimony of one John Barr, who gave testimony in a case at a former trial. To this the plaintiffs objected as incompetent. The defendant proved that said Barr had gone away, and a subpoena for him had been returned "not found." The plaintiff, still insisting on his objection, the defendant's counsel then produced from his own possession the following stipulation : "William L. Carroll vs. René Paul. In the St. Louis Court of Common Pleas. In this case, the testimony of John Barr, as given on the former trial of this case, as reported by the reporter, may be read in evidence on the part of the defendant, and books of account of the defendant, so far as entries are made by Carroll therein, are admitted. The ledger and day-book or account book, and the rent books of Paul, from May 1st, 1844, to November, 1846, are also admitted ; and that the letter of 14th January, 1847, was written in reply to the presentation of account "O" by John Barr." Todd & Krum, for plaintiff. St. Louis, March 31, 1851." The counsel for the plaintiff objected to the admission of the testimony of John Barr under the stipulation, and offered to prove that the stipulation was made at a previous term, and for the purpose of a previous trial ; that Barr's testimony had been read under it. Plaintiff's counsel insisted that he did not know that the paper was a valid one now, or in existence, as a stipulation, or that it was intended to be relied on, and objected that it had not been on file in the cause, but was produced by the defendant's counsel from his private papers. The court overruled the plaintiff's objections, and permitted the testimony to be read.

This stipulation is a general one, that the report of the testimony of John Barr, a witness, on the trial of this case, at a former term, may be read in evidence on the part of the de-

fendant, &c. It does not confine the use of this witness' testimony, which had once been given and taken down, to any particular term of the court, or any particular trial of the case.

The stipulation was not such a paper as was necessary to be filed in the cause. It contained, in itself, no evidence; it related to no fact to be enquired into or passed upon by the jury; it was offered to the court as a reason why the former testimony of a witness, taken down before the same court, by its reporter, on a trial between the same parties, of the same cause, should be again used in evidence. This stipulation had no condition in it—bears upon it no reason why it was made, such as; “for the purpose of having a trial at this term of the court, it is stipulated,” &c. But it is a general stipulation that the testimony of John Barr, as reported on a former trial of this cause, and taken down by the reporter, may be read in evidence on the trial of this case on the part of the defendant. The court below did right, then, to admit the testimony. This report of the testimony appears to have been a full one; there is a long cross-examination of the witness, Barr. This testimony, no doubt, was fully known to the plaintiff, as this case was, with the facts, heretofore before this court, in which the present appellant was then appellee, and one of the instructions asked by the plaintiff on that trial, mentions the testimony of the witness, Barr, and the account “O.” This evidence, then, was no surprise on the plaintiff. In the opinion delivered heretofore, in this case, it was stated: “We consider there was a variance between the second agreement and the item founded upon it in the bill of particulars. This objection, however, might have been obviated by an amendment, on such terms as would serve the ends of justice, and as the circumstances of the case required. This, however, could only have been necessary on the first trial, as the last was the third trial of the cause. We are at a loss to conjecture how the defendant could have been injuriously affected by the introduction of such testimony. It certainly created no surprise, as the former trial must have informed him of the future course of the

plaintiff." Now apply this liberal rule to the defendant, of which the plaintiff once had the benefit in this court, and how could the testimony of a witness, twice before used on trial, and which had been admitted by the plaintiff's counsel under a written stipulation, injuriously affect the plaintiff by being a third time used? There is nothing in the attempt of the defendant's counsel to have Barr subpoenaed that destroys the force of this general stipulation. He might have preferred the living witness before the jury. He might have thought it necessary, out of abundant caution, to make the effort to obtain the witness. There is nothing in the remark of the plaintiff's counsel that he did not know whether the stipulation was in force, or even in existence. This stipulation did not have the effect to introduce any new evidence — did not give a new phase to the facts or character of the facts. Upon the whole then, there is no error in the court below calling for the reversal of this judgment.

The judgment below is affirmed, with the concurrence of the other judges.

GOODMAN, Respondent, vs. SIMONDS, Appellant.

1. A party to whom negotiable paper is transferred merely as collateral security for an antecedent debt, will hold it subject to all the equities existing between the original parties.
2. A. delivered to B. his acceptance, payable four months after its date, for which a blank was left, with authority to negotiate the same. At the time of negotiating the bill, B. filled the blank with an anterior date. *Held*, the bill was void in the hands of the party receiving it, with knowledge that it was ante-dated.

Appeal from St. Louis Circuit Court.

This was an action of assumpsit, commenced in February, 1849, by Timothy S. Goodman against John Simonds, on a bill of exchange, dated September 12, 1847, drawn by Wallace Sigerson, of Cincinnati, Ohio, on John Simonds, in favor of John Sigerson, for \$5000, four months after date. The de-

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claration averred the acceptance of the bill by John Simonds, and the endorsement thereof by John Sigerson to T. S. Goodman & Co., who endorsed the same to W. Nesbit & Co., who endorsed the same to the defendant. At the April term, 1849, the defendant filed the statutory plea, "defending the demand of the plaintiff."

At the trial, which took place at the April term, 1853, the plaintiff introduced the bill of exchange, and proved the endorsements thereon, as stated in the declaration. William Nesbit, a witness for the plaintiff, stated that the bill was sent by the house of T. S. Goodman & Co., of Cincinnati, Ohio, to the house of W. Nesbit & Co., of St. Louis, for collection, a short time before its maturity. At maturity, the bill was presented to the defendant, and payment demanded and refused, whereupon it was protested for non-payment. W. Nesbit & Co. only held the bill for collection, and after the protest they endorsed it without recourse, and handed it to an attorney for collection. The endorsement was made to T. S. Goodman by request of the attorney, to facilitate collection.

The evidence for the defendant was substantially as follows: On the 21st of June, 1847, John Simonds, of St. Louis, wrote to Wallace Sigerson, of Cincinnati, stating that John Sigerson and himself were going to deal in pork another season, and desired the assistance of W. S. in procuring facilities in Ohio, as the Bank of Missouri furnished no accommodations. Inclosed in this letter was the bill of exchange sued upon, together with another for the same amount, both perfect, with the exception of blanks for the name of the drawer and the date. The letter instructed W. S. to negotiate one of the bills on receipt and remit the proceeds, and hold the other until further instructions.

On the 12th of July, 1847, W. S. procured one of the bills to be discounted in the Trust Company Bank, and remitted part of the proceeds to the defendant. The other bill, being the one sued upon, he left in the hands of T. S. Goodman & Co., on the 18th of October, 1847, as collateral security for two notes given by him, dated October 12th, 1847, one for

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\$2832 64 and the other for \$2830 45, having respectively sixty and seventy-five days to run. These notes were given to take up other notes of W. S., then lying over. No money was advanced by T. S. G. & Co. to W. S., nor was any new indebtedness created upon the faith of the defendant's acceptance. When T. S. G. & Co. received the bill sued upon, they promised that they would not send the same to St. Louis for collection until the maturity of the notes. On the 20th of November, 1847, T. S. G. & Co. wrote to E. W. Clark & Bros., of St. Louis, inclosing to them the bill, and instructing them to sell it at the best rates, not exceeding a discount of twelve per cent. They stated in their letter that they did not endorse the bill, as they were selling it for another. The evidence of brokers was offered, to show that this language did not imply that Goodman & Co. were not the owners of the bill. E. W. Clark & Bros. offered it to the defendant for sale, who notified them not to negotiate it, as W. S. had no authority to use it. Thereupon, they returned it to Goodman & Co. When Goodman was asked by Wallace Sigerson why he had sent the bill to St. Louis before the maturity of the notes, he hesitated a moment, and then replied that he wanted to see whether it was worth any thing or not, or something to that effect. When W. S. delivered the bill to T. S. G. & Co., the blank for the date was not filled, but he gave them a writing authorizing them to fill it.

McDonald, a book-keeper of Goodman & Co., testified that from June until October, 1847, he frequently saw W. Sigerson conversing with Mr. Goodman about notes he had got discounted, and which were not paid; that before taking the two notes dated October 12th, Mr. Goodman used every exertion to get W. S. to give collateral security, and it was only on his being able to give such satisfactory security as Mr. Simonds' acceptance that the notes were taken, W. S. being at the time insolvent. The bill was entered on the discount book of T. S. G. & Co., as collateral security. Previous to taking the acceptance, Goodman enquired of the Trust Company as to the responsibility of Simonds, and received a favorable answer.

The notes, as collateral security for which the bill sued upon

was delivered to Goodman & Co., were never paid. The court instructed the jury that, if T. S. Goodman & Co. acquired the bill sued upon from Wallace Sigerson, as collateral security for an indebtedness of his own to them of equal or larger amount, without notice of his want of authority so to appropriate the same, the plaintiff was unaffected by such abuse of trust or improper conduct, and the defendant could not set the same up as a defence in this suit. The court of its own motion also gave the two following instructions :

3. If the bill was received by the said T. S. Goodman & Co. in the manner and for the consideration already stated, it lies upon the defendant to prove said knowledge or notice on the part of the said T. S. Goodman & Co., or of some member of said firm. It is not necessary that the parties, at the time of the transfer, should have had certain and positive knowledge of the abuse of power on the part of the said Wallace—such as if they had been told by him that he had no authority so to pass the bill to them, or as would have been derived from having been shown the instructions from his principal ; but proof of such facts and circumstances, from which notice or knowledge may be satisfactorily inferred, or upon which men usually act in such cases, is sufficient.

4. But if, when the said bill was sent to the said Wallace by the parties interested, it was incomplete, having blanks for the date and the signature of the drawer, and he, the said Wallace, was authorized to fill up and negotiate the same, such knowledge or notice cannot fairly be deduced from the facts alone that the bill was not dated till at or about the time of its transfer ; and that the said firm were then acquainted with the pecuniary condition and affairs of the said Wallace, and were urging him to give them collateral security for his indebtedness to them ; that the said parties, at no time, made inquiry into his title or authority to transfer the bill ; and that the said Wallace did not wish the bill sent to St. Louis for collection, and so told the parties at the time.

The court refused to instruct the jury that the plaintiff could

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not recover on the bill, if it was delivered to the firm of which he was a member as collateral security for a previous indebtedness. An instruction that the ante-dating of the bill, with the knowledge of Goodman & Co., rendered the same void, was also refused.

There was a verdict and judgment for the plaintiff, from which the defendant appealed.

Glover & Richardson, for appellant. 1. That the holder of negotiable paper, who has taken it merely as collateral security for a pre-existing debt, and without notice of any objections, will be protected in his title, and that he will not be protected in such case, are propositions of law equally well supported by authority. The latter, we insist, is best supported by reason. The object of the rule which makes the holder of such paper safe, is to prevent losses to persons who might otherwise suffer from a confidence reposed in it. The rule implies that the holder has some way risked something through the confidence, which he is about to lose but for its beneficial interposition. When money or property is actually advanced on the faith of the paper, such a case exists, and the party ought to be secure on principle. When the paper is received in payment of a debt pre-existing or otherwise, and the evidence of the debt is surrendered, or the liability destroyed, the rule may be applied with reason and justice. But when the case is one merely of collateral security, it is difficult to perceive what the holder risks, how his confidence betrays him, or what injury he can sustain. A man may well hesitate to purchase a bill in the market by parting with his money or his property, or surrendering his debt, while, if the same bill was tendered him as collateral security, he would be glad to take it. It can do him no harm; he absolutely hazards nothing. 2. The court erred in giving the fourth instruction. Whether T. S. Goodman & Co. purchased the bill in good faith, in the usual course of trade, for a valuable consideration and without notice, was a question of fact for the jury. The appellant had a right to their verdict upon the evidence. 8 Cow. 340. 12

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J. R. 306. 4 Mass. Rep. 270. 3 Carr. & P. 325. 6 Iredell, 199. 8 Ohio, 528. 12 Pick. 545. 7 Ala. 259. 4 B. & C. 330. 4 Binney, 471. 12 Mo. 381. 11 Mo. Rep. 116, 402. 3. The court erred in refusing to instruct the jury that if the plaintiff took the bill, knowing that it was antedated, he could not recover.

Haight and Shepley, for respondent. 1. Negotiable paper, taken before maturity in the ordinary course of business, as collateral security for a pre-existing debt, is held by the endorsee, discharged of all equities between the original parties. *Swift v. Tyson*, 16 Peters, 1. *Mann v. McDonald*, 10 Watts, 270. 12 Smedes & M. 462. *Blanchard v. Stevens*, 3 Cushing, 162. *Loker v. Clark*, 11 Mo. Rep. 97. 2. The court properly refused to instruct the jury that the filling up of the blank left for the date, by inserting a date anterior to the time of the transfer, made the bill absolutely void. Nothing is better settled than that, when a person gives to another an instrument with blanks to be filled, he thereby gives him full power to fill such blanks as he may deem best, and any filling up of such blanks binds the original party to the instrument, unless the person taking it had knowledge or notice that the filling up was unauthorized. *Huntington v. Branch Bank*, 3 Ala. 186. Am. Law. Reg. for May, 1853, p. 422.

RYLAND, Judge, delivered the opinion of the court.

From the statement of the facts in this case, several important questions arise, which it becomes necessary for this court to notice. There is no doubt that the bill of exchange on which the suit is brought, was negotiated between Wallace Sigerson and Timothy S. Goodman & Co., brokers at Cincinnati, sometime in 1847, as collateral security, and the present plaintiff being one of that firm, is affected with all the notice of the transaction that the firm could be; for it is to be seen, that the firm of T. S. Goodman & Co. sent the bill out to E. W. Clark & Bros., at St. Louis, for sale, and one of the firm of

Clark & Bros. was informed by Simonds, the acceptor, that the bill was a forgery; that Wallace Sigerson had no authority or right to draw such a bill; that Clark & Bros. sent the bill back with this information to Goodman & Co., who sent it to Nesbit & Co., of St. Louis, for collection, and that Nesbit & Co., without recourse and without value, endorsed it to T. S. Goodman, the plaintiff, and this was done by the advice of the attorney, who brought the suit. Therefore it is to be considered, as it would have been, had it remained in the hands of T. S. Goodman & Co. It appears that this bill of exchange was passed to T. S. Goodman & Co. by Wallace Sigerson, on the 18th day of October, 1847; that it was negotiated with Goodman & Co. on that day, as collateral security, for the purpose of securing the payment of two notes discounted by Goodman & Co. for Wallace Sigerson—these notes bearing date 12th October, 1847—one due in sixty days for \$2836 64, the other due in seventy-five days, for \$2830 45. These notes were given to take up other notes which had been lying over. It is in proof that, previous to Goodman & Co.'s taking these last notes, Goodman had used every exertion to get Wallace Sigerson to give collateral security, and a witness, the clerk of Goodman & Co., states that it was only on Wallace Sigerson's being able to produce such satisfactory security that the notes were taken. This collateral security was the bill of exchange drawn by Wallace Sigerson on John Simonds, of St. Louis, which was payable to John Sigerson for \$5000, at four months, accepted by Simonds and endorsed by John Sigerson. This same witness states that, upon inquiry made by Goodman, and finding the ability of Simonds, he (Goodman) took the bill for five thousand dollars as collateral security, and in the discount book of the house of T. S. Goodman & Co., the bill of John Simonds is inserted as collateral security. This transaction, then, between Wallace Sigerson and Goodman & Co. took place on the 18th October, 1847. At that day, this bill was negotiated. It appears that the bill was originally drawn in blank, as to the date and the name of the drawer; it

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was drawn for \$5000; it was payable at four months from date; it was accepted by Simonds, endorsed by John Sigerson, the payee, and was forwarded by Simonds to Wallace Sigerson, with another bill in the same condition, in order to raise money to enable John Sigerson and John Simonds to carry on the pork business at St. Louis. It was sent to Wallace Sigerson, with instructions and directions what and how to do with it, in the month of June, 1847. It was in proof that Wallace Sigerson left the bill of exchange with Goodman & Co. some time after he received it; that when he left it, it was not complete—it lacked the date; that Wallace Sigerson left with Goodman & Co. an instrument of writing authorizing them to date the bill, but it was not dated until Sigerson dated it himself upon the settlement, when he gave his notes. Nothing was paid to Wallace Sigerson by Goodman & Co. for the bill: nothing to Jno. Sigerson or to Jno. Simonds, on account of it, but it was merely left as collateral security for the two notes, which were given for previously existing indebtedness by Wallace Sigerson to Goodman & Co. Wallace Sigerson remarked to Mr. Goodman that he did not wish the bill to go to St. Louis, under any circumstances, for collection; that he wished to pay the amount here (at Cincinnati,) and the notes were given so that they would mature long enough before the bill matured, for the holders to send it out for collection.

Here, then, is a creditor extremely anxious to get his debt either paid or secured: he urges the debtor by every possible exertion to secure it. His debtor is known to be much embarrassed, utterly unable to pay his debts. This debtor leaves a bill of exchange for five thousand dollars, payable in four months, with blank date, with this creditor; leaves an instrument in writing, authorizing the creditor to fill up the date; it is not done however. Afterwards, this same debtor leaves the bill of exchange, then with the blank date filled up, as collateral security for a pre-existing debt. Can it be said that the holder has given value for this bill under such circumstances? Can it be said that there are not circumstances here sufficient

to put a prudent man upon inquiry? What was the blank bill doing in the hands of a man so much harassed, so urgently importuned by his creditor, for so long a time? Why was it left with the same creditor still incomplete as to date? And why, at last, was it used as collateral security, with the request not to send it out for collection? A plain answer may be given. This creditor saw, from the utter inability of Wallace Sigerson to pay his debt, that he must lose it, and in such a condition, any thing in the way of collateral security would be a fortunate occurrence. He would not be worse off by taking this bill: he paid nothing for it: it might turn out to his advantage: he ran no risk in getting it passed to him as collateral: he did not thereby increase his demand against Wallace, and possibly he might secure his debt. In my view then of the law in this case, such circumstances would charge a creditor, who takes a bill as collateral security for a previous debt, without any additional advance upon it, with notice of the rights and defences of other parties to it.

There is another ground of defence in this case, which destroys the plaintiff's right to recover, if it be true. That is the ante-dating of the bill. There can be no doubt that the bill was passed as collateral security only to Goodman & Co. either on the 12th or on the 18th of October, 1847. The 18th is the date of the entry in the bank book of the firm of Goodman & Co., made by the clerk; that then is the day the bill is perfected and negotiated, and by the terms of the bill it has four months to run. Now it is not competent to shorten this time by ante-dating. This must have been well known to Goodman & Co.; they knew the day the bill was passed to them; they could see from its face the purport of credit, four months from date, and the date must, from necessity, be when the bill is negotiated. Now, though it may have been in their hands a blank, long before it was passed to them as collateral, this does not authorize the date to be put some thirty days back, to give it the effect in their hands of a three and not a four months' bill. They cannot but know the time when they thus obtained the

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bill as collateral security; they could then see whether it was dated or not. It means "four months" from date of negotiation; it authorizes the person to whom it was sent to date at the time of negotiation. There can be no doubt that it was negotiated on the 12th or on the 18th of October, 1847. The book-keeper says on the 18th. Sigerson says, when he settled and gave the two notes, he left the bill with Goodman & Co., and then he dated it, or it was dated in his presence. It bears date the 12th of September, 1847, one month earlier than the notes—one month before it was negotiated. This is very suspicious, nay, it is fatal to the bill.

In 17 Wend. 221, it is said by the court, that the holder may put the blank paper in any form which shall accord with the *intent* of the names, either as makers, drawers, payees or endorsers. It is the intent of the parties, manifested by the face of the blank bill, which must control the holder. He cannot do violence to this intent.

In 5 Dana, 259, it is said by the court of appeals of Kentucky, if a sum and date were written on the paper, when signed and delivered, with the intention that it shall be filled up with that sum and that date, and with no other sum or date, and if, without authority, that sum and date be torn off, and a larger sum and earlier date inserted, the note, "as sued on," is not, in judgment of law, obligatory as the act of the apparent obligors.

Story, on Promissory Notes, says: "But it is very common for persons to sign their names in blank to a paper for the purpose of having a promissory note written over it, and in such a case, the note, when written, will bind the party, if done by a person properly authorized, in the same manner and to the same extent and from the same time, as if it had been originally filled up before the signature was made." Story on Promissory Notes, p. 13, sec. 10.

In the case of *Montague v. Perkins*, cited by the plaintiff's counsel, from the Law Reporter for October, 1853, Jervis, C. J., says: "A person by handing over to another his blank acceptance, gives him the opportunity of filling it up to the

amount and date limited by the stamp." Maule, J., said: "the defendant, by writing his name on the blank bill stamp, and issuing his blank acceptance, must be taken to have known that he put it in the power of any person who got hold of the paper, to make him appear to the public as the acceptor to any amount of which the stamp admitted. Why does the stamp have the effect of restraining the amount? Because the authority is presumed to be limited by the stamp, as to amount, and that appears on the face of the instrument."

Apply this doctrine to the bill in this case, and it will be seen that the time of "four months" appearing on the face of the bill, the authority to fill it up must be restrained as to time. It cannot be construed into power to make a four months' bill on its face, though blank as to date, become a bill of less time, by ante-dating it. The intention of the acceptor is plain, that he accepts only a bill at four months, when negotiation is completed, and this four months on its face is notice of this intention to all persons who see it in its blank form. The testimony shows that, in this case, this bill was in the hands of Goodman & Co., with its blank date; that the bill was afterwards filled up. Now, if it was filled by ante-dating, when the plaintiffs, that is, Goodman & Co., received it as collateral security, it must have been known to them, and they must be held to be conniving at this imposition on the acceptor.

In the nature of things, it is impossible for a prudent, careful man to shut his eyes to the circumstances surrounding this whole transaction with Wallace Sigerson and the bill, make no inquiries, and take the bill in the fair and usual course of business. But a man catching at every chance to save himself never inquires, so he can obtain collateral security, about the fairness of the transaction; he gives nothing for it: he risks nothing for it: then, common sense and common honesty unite in saying he shall take it, with the defences the other parties have against it in the hands of the original holder and party. We do not say that a bill of exchange, passed to a person in the payment of a pre-existing debt, would be liable in his

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hands, without notice, to the equities or defences of the original parties ; but that the holder of a bill merely as collateral security for a pre-existing debt, having given no value for it, no consideration for it, holds it liable to such equities. We know that there are authorities whose phraseology may be considered against this view, but we also know that there are authorities in its favor, and we think reason and justice unite in supporting it. See *Coddington v. Bay*, 20 Johns. Rep. 637. *Stalker v. McDonald and others*, as late as 1843, 6 Hill, 93. This last case is a very elaborate one, in which the opinion of Mr. Justice Story, in *Swift v. Tyson*, 16 Peters, is ably reviewed.

In regard to the ante-dating of the bill, see *Tate & Hopkins v. Evans et al.*, 7 Mo. 419. Authority was given by letter signed by Evans & Dougherty to J. S. Arnold to draw on them for an amount not exceeding \$1500, at four months. This was dated 28th November, 1839. The bill of exchange was drawn on 23d December, 1839, and ante-dated 28th November, 1839, and the plaintiffs took the bill on the faith of the letter of Evans & Dougherty. The court below, from this statement of facts, found for defendants, and this court affirmed the judgment. Here the ante-dating rendered the bill void. Authority to draw at four months means four months from the time the bill is drawn. A bill at four months on its face, with blank date, is still to be four months from the time of its negotiation.

The instructions given by the court below did not put the law of this case before the jury. The court takes up a part of the case, and in effect says to the jury, these facts will not authorize a verdict for the defendant, and then the balance of the case is disposed of with similar effect. The instructions asked by the defendant in regard to the ante-dating of the bill, and in regard to the collateral security without consideration, ought to have been given.

The judgment of the court below is reversed, and the cause remanded, Judge Scott concurring ; Judge Gamble not sitting.

CLEMENS, Respondent, vs. BROOMFIELD, Appellant.

1. No instrument can be a lease which is not signed by the lessor.
2. In a tenancy from year to year, a surrender by operation of law takes place when, by the consent of both parties, another person becomes tenant of the premises, and the landlord collects rent from him.
3. Instructions are still proper on a trial without a jury, in cases appealed from justices of the peace.

Appeal from St. Louis Circuit Court.

This was an action begun before a justice of the peace by Clemens against Broomfield, to recover rent for one month and a half ending August 16, 1850. There being a judgment for the plaintiff before the justice, the defendant appealed to the Circuit Court. At the trial, the plaintiff read in evidence the following instrument of writing :

"I have leased from James Clemens, jr., for one year, with the privilege of five, to commence on the first day of April, in the year one thousand eight hundred and forty-eight, (1848,) that brick house and lot on Olive street, in block number thirty-one, (31,) in the city of St. Louis, bounded on the north by Olive street, on the east by lot belonging to Mrs. Octavia Delany, on the south by an alley, and on the west by a lot belonging to W. S. Harney, at six hundred and fifty dollars (\$650) per annum, payable monthly, on the first days of each and every month ; and it is expressly agreed and understood by and between the lessor and lessee, that if, at any time, said rent should be behind and in arrear, it shall and may be lawful for the lessor, or his successors, to enter into and upon the premises, and declare the lease forfeited and ended, and to take possession of the premises hereby leased, after having first given three days' notice in writing, which said notice may be served by posting a copy or duplicate of the same upon the premises, or by delivering a copy of such notice to said lessee or his legal representatives ; and in case of the non-payment of rent, all the fixtures in the house, with the furniture in the

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same, and improvements, if any made by the lessee, are pledged and to be held bound for the payment of any rent due and unpaid, and are not to be moved until all sums due for rent or balances of rents, are paid. The said brick house and lot, at the expiration of this lease, to be surrendered to the lessor, his heirs, successors or assigns, in the condition received, excepting only its natural wear and decay. The lessee hereby engaging to pay double rent for every day that he or any one else in his name shall hold on after the expiration of this lease, or its forfeiture, in consequence of the non-payment of rent, as herein stipulated. This brick house and lot is to be kept free from nuisances at the expense of the lessee.

“W. W. BROOMFIELD.”

There was evidence that, after the defendant had entered upon the second year, and between the 1st of April and the early part of May, 1849, he put Coulter & Colman in possession of the premises. Colman applied to the plaintiff for his consent to the transfer. Plaintiff replied that the lease gave him no right to prohibit the transfer, and he did not care who was in the house, so long as he received his rents. Two or three transfers of the premises were made after this, with the consent of the plaintiff expressed in similar terms. After the first transfer by the defendant, plaintiff always received the rents from the parties in possession, but gave receipts in the following form: “Received of W. W. Broomfield, per ———,” &c., and, as his clerk testified, “always refused to release the defendant.” The rent sued for accrued during the tenancy of the last tenant.

The defendant asked the following declaration of law, marked “B,” which the court refused to give:

“If the jury believe from the evidence that defendant, with the consent of plaintiff, transferred the lease to other parties, and that said parties, without the consent of the plaintiff, and without the knowledge or consent of defendant, transferred the said lease to third parties, that plaintiff received rents from said parties, and that the amount sued for accrued during the

time said third parties were in possession, defendant is not liable for such rent, and the jury will find for the defendant."

Instructions to the effect that the consent of Clemens to the transfer of the possession of the premises, and the acceptance by him of rent from the subsequent occupants discharged the defendant, were refused. The court declared the law as follows: "The relation between plaintiff and defendant, under the lease, not having been dissolved during the first year, the term, in effect, became extended to the full five years; and the evidence fails to establish such a surrender or release after the first year, as operated to discharge the defendant from his obligation to pay rent."

The defendant excepted, and after a judgment for the plaintiff, appealed to this court.

Leslie & Barrets, for appellant. 1. The law is well settled that an actual change of possession, by the mutual consent of landlord and tenant, and an acceptance of rent by the landlord from those in possession, amounts to a surrender of the lease by the tenant, and releases him from all obligation to pay rent. Coote on Landlord and Tenant, 397, 398. *Bees v. Williams*, 2 Crompton, Meeson & Roscoe, 581. *Reeve v. Bird*, 1 ib. 37. *Hall v. Burgess*, 5 Barn. & Cress. 333. *Mallet v. Grayne*, 2 Campbell, 103. 2. The lease to Broomfield is for one year, with the privilege of five. This, we maintain, is not a lease for a longer term than one year, unless renewed or extended by some further action of the parties. Broomfield's retaining possession after the expiration of the one year, is not of itself sufficient to create such a renewal or extension of the lease, but only constitutes him a tenant at sufferance.

H. N. Hart, for respondent. 1. The fact that the lease was transferred, even with Clemens' consent, and that Clemens accepted rent from the assignees, did not release the defendant from his liability under the lease. Taylor on Landlord and Tenant, 213, and numerous authorities cited. 2. The instruc-

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tions asked by the defendant were properly refused, for the reason that the trial being before the court, it was improper to ask instructions. New Practice Act, art. 15.

GAMBLE, Judge, delivered the opinion of the court.

1. The instrument produced by the plaintiff as a lease to the defendant, Broomfield, appears to be signed and sealed only by the defendant, and on its face, it has no language or expression purporting to be the language of Clemens. It contains no grant from him of any interest in the premises demised; and although Broomfield recites that he had leased the premises from Clemens, this may as well mean that the demise was by parol as by written lease. The instrument produced is not itself a lease. *Marlow v. Wiggins*, 3 Gale & Dav. 504. *Richardson v. Gifford*, 1 A. & E. 55. Although a lease may be made in a very informal manner, and by almost any words that show the intention of the parties, yet the lessor makes no written lease until he has signed the paper.

2. The present case stands as a parol lease by Clemens, and if it is contended that it was a demise for five years, it can, at most, only operate as a lease from year to year, under our statute of frauds. The instrument produced contains no express covenant on the part of Broomfield to pay the rent during the term. The case, therefore, is to be regarded, in a suit brought as this is, to recover part of the rent of the third year, as a tenancy, from year to year, with the tenant bound to pay the rent for the current year, as the result of his occupying the premises. In such tenancy, a surrender by operation of law takes place when, by the consent of both parties, another person becomes tenant of the premises, and the landlord collects rent from him. *Bees v. Williams*, 2 Crompt. Mees. & Ros. 581. *Hall v. Burgess*, 5 Barn. & Cress. 333. *Thomas v. Cook*, 2 Barn. & Ald. 119. *Hamerton v. Stead*, 3 Barn. & Cress. 478. *Matthews v. Sawell*, 8 Taunt. 270.

3. The present case came to the Circuit Court by appeal

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from a justice of the peace, and the trial was before the court. The court did not make a decision in writing, as is required by the code, in cases of trial by the court without a jury, but determined the question of law in the form of instructions given and refused. We have already, in at least two cases at this term, expressed the opinion that the cases which come by appeal from justices of the peace, are not regulated by the code, in respect to finding facts by the court, when the trial is without a jury; and that the old practice of hypothetical instructions, or declarations of the law by the court, is the practice still to be pursued in such cases.

In the present case, the views of the law taken by the Circuit Court, in giving instructions and refusing those asked by defendant, do not correspond with those expressed in this opinion in relation to a surrender. The declaration or instruction asked by the defendant, marked B, ought to have been made by the court, as a declaration of the law applicable to the case. So the instructions given by the Circuit Court give a different effect to the written instrument which was in evidence, from that which this Court thinks it entitled to.

The judgment is, with the concurrence of the other judges, reversed, and the cause remanded.

FARRAR, Respondent, vs. LYON, Appellant.

. A court trying a case without a jury should find all the facts upon the legal effect of which there is really a dispute between the parties. Thus, where a defendant, who was sued upon a note and pleaded payment, gave evidence of certain facts, which he claimed amounted to payment, *it was held*, a general finding that the defendant was indebted to the plaintiff, *was not sufficient*.

Appeal from St. Louis Court of Common Pleas.

Frémon & Reber, for appellant.

C. C. Whittlesey, for respondent.

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GAMBLE, Judge, delivered the opinion of the court.

Farrar sued Lyon upon a negotiable promissory note. Lyon answered that he paid the note to the agent of the plaintiff, who then had the note in his possession. The court tried the cause without a jury, and rendered a general verdict for the plaintiff, and then found that the defendant was indebted to the plaintiff in a sum stated. There is no decision of the court, except as it appears in the entry of the verdict and judgment. There is no finding of the issue of payment, except as it is argumentatively involved in finding that the defendant is indebted to the plaintiff. The same finding would be just as good a finding in a case where, in the answer, the defendant set up several different defences to a note, as fraud, duress, want of consideration, &c. ; for such finding, in such case, would be just as full a finding that the defences were not sustained by the evidence as it is in the present case. Yet, if in such case there was a real controversy between the parties upon the defences stated, it is evident that a wide range would be open for the proof of facts, and many difficult questions of law might arise. In such case, it is evident that the real spirit of the code requires something more than a mere general verdict, even when the court arrives at the conclusion that the defences are not sustained ; for, upon such finding, there can be no review upon any other question of fact than the whole matter in issue upon the whole evidence. It is admitted that there are difficulties in establishing a correct practice in these cases of trial by the court without a jury. The finding of the court is, like a special verdict, to contain a finding of facts, not of evidence, and as the ultimate fact in controversy may be established by proof of circumstances, it would seem to be sufficient to find such fact, or to negative it in the language of the issue, without finding the facts upon which the parties rely for establishing or negating its existence. Where there are no facts proved upon which a party relies to maintain the issue on his part, it is

clear that the court can do no more than find the issue in its own terms, in the affirmative or negative, as it may be framed. Where it becomes a question of law whether the facts proved maintain the issue, there it would seem proper that the facts proved should be specially found. An issue of payment may present such a case. When a person, indebted to another on several different accounts, makes a payment, it is a question of law as to how the payment shall be appropriated; settled, it is true, by authority, but still it is a question of law. When we look into the present record, we see evidence that Hugh A. Garland was the holder of the note sued on, by endorsement from the payee for collection, and that he had in his hands money collected for the defendant, and that upon some inquiry, possibly not amounting to a demand, by the defendant, he claimed the right to retain the money in payment of the note. The defendant claimed that the facts in evidence amounted in law to a payment. In such case, it would seem but reasonable that the facts thus claimed to have such legal effect should be found by the court.

This finding of facts by the court, when trying a cause, is evidently required for the benefit of the parties litigating, and where there is really a dispute between them as to the effect which the law gives to the facts found, it is but giving effect to the code to say that the court should, in such case, find the facts upon which either party claims that the issue is maintained on his part, however clear the mind of the court may be on the question of law arising upon the facts proved.

In the present case, the issue of payment made by the parties is not found by the court, and the authority for finding a general verdict for one party or the other, which is given to juries, is not intended for courts.

The judgment is reversed, and the cause remanded, with the concurrence of the other judges.

Brake v. Corning.—Gates v. Clavadetscher.

BRAKE & KAYSER, Respondents, *vs.* CORNING, Appellant.

1. Johnson v. Jones, 16 Mo. Rep. 494, affirmed.

Appeal from St. Louis Court of Common Pleas.

C. Gibson, for appellant.

C. B. Lord, for respondent.

GAMBLE, Judge, delivered the opinion of the court.

1. The answer of the defendant, which was stricken out by the Common Pleas, merely presented a claim upon the plaintiffs in favor of the defendant, for alleged negligence in a matter in which they acted as the agents of the defendant. There is no connection between the claim thus set up and the note or the consideration of the note sued on by the plaintiffs. It is an independent set-off of unliquidated damages, which is not to be allowed. *Cowan v. Modrell*, 15 Mo. Rep. 424. *Johnson v. Jones*, 16 Mo. Rep. 494.

The judgment of the Court of Common Pleas is, with the concurrence of the other judges, affirmed.

GATES, Plaintiff in Error, *vs.* CLAVADETSCHER, Defendant in Error.

1. The attachment law of 1845, and not the new code, governs as to the publication of notice to non-resident defendants in attachment suits.
2. No finding of facts is necessary upon an inquiry of damages after a judgment by default.

Error to St. Louis Court of Common Pleas.

Gates brought suit by attachment on an open account against Clavadetscher, returnable to the September term, 1852. The sheriff returned that Clavadetscher was not found. At the

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September term, the plaintiff took the usual order for publication of notice, to be made according to law. At the February term, 1853, the plaintiff took judgment for want of an answer, and submitted the case for proof of his damages to the court. The court found in his favor a large amount of damages, but filed no decision in writing. At the same term, the defendant moved to set aside the judgment for irregularity, and in support of the motion, showed in evidence that the order of notice was, in fact, published *five weeks only*, and that the judgment was rendered on proof of such publication only. The court below overruled the motion, and the defendant below excepted.

R. M. Field, for plaintiff in error.

Comfort & Manter, for defendant in error.

RYLAND, Judge, delivered the opinion of the court.

1. The only point in this case calling for the opinion of the court, is in relation to the time of publication of the notice. The statute of 1845, concerning attachments, is still in force; the manner of giving notice, what the notice shall contain, the manner of giving publicity in some newspaper printed in this state, the last insertion to be not less than four weeks before the first day of the next term, &c.; all these things must still be adhered to in attachment cases. Why should eight weeks publication be required? Why retain most of the provisions of the attachment law of 1845, set forth in sections 14, 15 and 16, in article 1, and yet reject the four weeks' publication, and in lieu of this provision, take the publication required in the new general practice act of eight weeks? The practice act requires publication of notice to non-resident, absent or unknown defendants to be made for eight weeks successively, the last insertion to be four weeks before the commencement of the term, and it provides that suits may be brought by attachment, in the cases, and conducted in the manner authorized by statute in such cases, provided that the pleadings and procedure shall be, as near as may be, according to the provisions

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of this act, that is, the proceedings in the courts, so far as the mode is concerned. The practice act has had the tendency to increase suits and costs enough already among litigants, and this court is not disposed to increase the costs of giving notice in attachment suits, by doubling the length of the publication in a newspaper. We do not think the general practice law of 1849 was designed to affect the provisions in the attachment law of 1845, any further than to alter the pleadings. The plaintiff is to sue by petition, and the defendant to answer, and then the mode of carrying on the case before the courts is to be, as near as may be, in conformity to that act. This point is valid against the defendant below.

2. The second point is also for the plaintiff below. The court is not required to find the facts, and preserve them by filing them in writing with the clerk, in cases where judgments by default have been rendered. It is only where an issue of facts has been referred to the court by the parties, that the facts must be found.

The judgment below is affirmed, the other judges concurring.

BERGESCH, Plaintiff in Error, *vs.* KEEVIL, Defendant in Error.

1. A. conveyed personal property to B., in trust to secure the payment of a debt to C. Afterwards, A. conveyed the same property directly to C. *Held*, a suit against D. to recover possession of the property was properly brought in the name of B.
2. A petition filed for the recovery of personal property was not verified by affidavit. The plaintiff swore to the petition before a justice, but the justice failed to annex his certificate. *Held*, the plaintiff might be permitted to verify the petition *nunc pro tunc*.

Appeal from St. Louis Court of Common Pleas.

This was an action brought under the article of the new code entitled "claim and delivery of personal property," by Ber-

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gesch against Keevil. Annexed to the petition was the affidavit required by the statute, signed by the plaintiff, but without a *jurat*. At the return term, the plaintiff filed an affidavit stating that he had sworn to the petition before a justice of the peace before it was filed, but that the justice had failed to append his certificate evidencing the fact. He thereupon moved the court to allow the justice to append his certificate *nunc pro tunc*, or for leave to file a new affidavit. This motion was overruled. A motion to dismiss the suit was also overruled. A motion to rescind the order for the delivery of the property to the plaintiff, made by the clerk in vacation, was sustained and the suit proceeded. The court sustained a demurrer to the plaintiff's petition, because the suit was not brought in the name of the proper party. The plaintiff sued out a writ of error.

C. Gibson, for plaintiff in error.

C. B. Lord, for defendant in error. The demurrer was properly sustained. Bergesch had no interest in the subject matter of the suit. The conveyance to him was for the purpose of securing Taylor's note to Koppelman, and is merged in the subsequent conveyance to Koppelman himself to secure the same note. 12 Vermont, 113. 1 Watts & Serg. 83. *Mills v. Comstock*, 5 J. C. R. 214. *Lewis v. Starke*, 10 S. & Marsh. 120. 2. The court should have dismissed the suit, for want of the affidavit required by law. Art. 7, sec. 2, Code of Practice.

SCOTT, Judge, delivered the opinion of the court.

John Taylor owned some personal property, and conveyed it by deed to the plaintiff in error and the plaintiff below, in trust to secure the payment of a debt due John H. Koppelman. Afterwards, Taylor, by deed, conveyed the same property directly to Koppelman, and the defendant, Keevil, having taken possession of it, this action was brought by Bergesch to recover it; and the question is, whether the suit was properly brought in his name.

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1. Bergesch was the trustee of an express trust, and the deed to him from Taylor conveyed the legal title. Taylor's subsequent deed could not divest this title without the consent of Bergesch. That deed was inoperative, so far as it affected the property previously conveyed. Bergesch having the legal title, and being the trustee of an express trust, the suit was properly brought in his name.

2. The affidavit of Bergesch, showing that the petition was sworn to before it was filed, warranted the court in overruling the motion to dismiss the suit. The court, under the circumstances, might have permitted the petition to be verified *nunc pro tunc*.

The other judges concurring, the judgment will be reversed, and the cause remanded.

BERSCH, Respondent, *vs.* DITTRICK *et al.*, Appellants.

1. The plaintiff sued for services from January 17 to June 15, 1853. The defendants answered that, *on or about* January 17, 1853, the plaintiff contracted to serve them for one year from January 17, and that he quit without cause before the expiration of the year. This answer was stricken out for the reason that, consistently with its allegations, the contract might have been made *prior* to January 17, for a year's service to commence at a future day, which would be within the statute of frauds. *Ild*, it was error to strike out the answer, that section of the code being applicable, which says that the allegations of pleadings shall be liberally construed, with a view to substantial justice.

Appeal from St. Louis Law Commissioner's Court.

Cline and *Thompson*, for appellant. I. The court erred in sustaining the motion of the plaintiff for judgment notwithstanding the answer, because there is a specific denial of the allegations contained in the plaintiff's petition.

The answer sets up a consistent, substantial defence, independent of the denial, and does not admit the monthly value of any services whatever.

The answer, for all purposes for which we have to do with it, must be taken as true; it sets up the fact that the plaintiff was retained as clerk and servant by the defendants for the space of one whole year from January 17, 1853. This contract, as set up in defendant's answer, is clearly not barred by the statute of frauds. *Benton v. Colliger*, 4 Bingh. 309. 2 Car. & P. 607. *Sykes v. Dixon*, 9 Adol. & Ellis, 693. Chitty on Cont. 68.

This contract, as set up in defendants' answer, shows a general hiring to commence in the present, and to terminate in one year; this we hold to be binding, though not in writing. Authorities above cited.

H. N. Hart, for respondent. I. Does the answer in this case set up a contract made on a day certain, and to complete and terminate within one year from the day of the making of the said agreement? II. Does the answer deny that the respondent did work and labor for appellants, as stated in the petition, and at the price and sum per month, as stated? 1. The answer is too vague and uncertain as to the allegation setting up a parol contract, to bring the same out of the statute of frauds. The language of the statute is, "or upon any agreement that is not to be performed within one year from the making thereof." 5 sec. Frauds and Perjuries, R. C. 529. 2. The answer does not, with any certainty, set up a contract made with respondent on a day certain, and that one year from the 17th of January, 1853, was one year from the day of the making of the verbal contract. 3. A parol agreement for a year, made before the commencement of the year, is void for not being in writing. 5 sec. of stat. 1845, Frauds and Perjuries, 529. 11 Verm. 428. 3 Hill, 128. 16 Conn. 246. 1 Denio, 602. 1 ib. 606.

GAMBLE, Judge, delivered the opinion of the court.

1. The plaintiff sued for services rendered to the defendants from the 17th January to the 15th June, 1853, at \$66 66 $\frac{2}{3}$ per month. The defendants answered that the plaintiff, *on or*

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about the 17th January, agreed with the defendants to serve them in their store for the period of one whole year from the said 17th of January, at the salary of \$800, and that, under the said agreement, the plaintiff, *on or about* the said 17th of January, entered upon the service and continued therein until the 15th of June, when, without cause or reason, he quit the service and refused to comply with his contract.

The court below treated the contract set up in the answer as void, under the statute of frauds, because it did not appear to be one which was to be performed within a year, and gave judgment for the plaintiff on the answer. The argument made here to sustain the decision of the court is, that the answer, by stating that the contract was made *on or about* the 17th of January, for services to commence on the 17th of January and to continue for a year, embraces a case in which the contract was made several days prior to that day, so as to be a contract for a year's service to commence in the future. The answer in this case is so drawn as to present a case which will be within the statute, while, at the same time, its terms describe a contract which may not be within it. "On or about" a given day may, in literal strictness, mean on the day, or on a day either before or after the day. As this allegation in the answer may cover a contract which is not affected by the statute, it is thought proper to apply to it the rule declared in the 5th section of the 7th article of the code, in these words: "In the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties." In the present case, it will be entirely within the power of the court, upon the trial of the case, to give full effect to the statute, if the contract which the defendants may prove shall appear to be one for a year's service, to commence in the future. The course which has been adopted of rendering judgment on the answer, assumes that the contract is void because it may, consistently with the allegation of the answer, have been made some time prior to the 17th of January. Although such case would be consistent

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with the allegation in the answer, yet it would be equally consistent therewith that the contract was made on the 17th January, or even on a day subsequent.

The judgment is reversed, with the concurrence of the other judges, and the cause remanded.

KERR, Respondent, *vs.* CLARK, Appellant.

1. A parol lease, for a term of years, though by the statute of frauds declared to create a tenancy at will, has the effect of creating a tenancy from year to year, such being the established construction.
2. It is not a sufficient plea of a surrender to state that the tenant delivered up possession of the premises to the landlord. It must be stated that the landlord consented to accept the possession and discharge the tenant.

Appeal from St. Louis Circuit Court.

Kerr sued Clark for the rent of a house for the two quarters ending April 1st, 1852. Clark answered that he rented the house verbally for five years, thereby becoming a tenant at will; and that, on the 17th of February, 1852, finding that he was unable to pay so high a rent, he left the house and delivered the possession thereof to the plaintiff or his agent. A motion to strike out this answer being sustained, the defendant asked leave to file an amended answer. Being requested to state in what particulars he proposed to amend, his counsel stated that "it was simply as to what already, as he was of opinion, sufficiently appeared in the answer, to-wit, the delivery of possession to defendant." The court refused to allow the amendment, and gave judgment for the plaintiff, from which the defendant appealed.

M. L. Gray, for appellant. 1. The defendant was a tenant at will only, and the delivery of the possession of the premises to the plaintiff, on the 17th of February, 1852, put an end to the tenancy and discharged him from further rent.

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Statute of Frauds, R. C. 1845, sec. 1. 2 Smith's Lead. Cases, 159-60. 1 Pick. 45. 3 Met. 350. 13 Maine, 214. 2. But if defendant was a tenant from year to year, the tenancy was terminated by the act of the parties on the 17th of February, 1852. The premises were delivered to the plaintiff, and of course accepted by him. This terminated the tenancy. Chitty on Contracts, 329, and notes. 5 Taunt. 518. 8 B. & C. 324. 3 Nev. & Perry, 243. 7 Watts, 123. 3. If the appellant's answer did not sufficiently allege a surrender, he was entitled to amend. New Practice Act, art. 11, secs. 5, 7.

Knox & Kellogg, for respondent. The answer admits an agreement by which the defendant became a tenant from year to year, and that he left in the middle of a quarter, and surrendered the premises to the plaintiff. It is not alleged that the plaintiff assented to the surrender. 3 Esp. 225. 5 Taunt. 518. 2 Starkie, 379.

GAMBLE, Judge, delivered the opinion of the court.

1. The defendant being sued for the rent of a house for two quarters, answers that he held the house under an agreement for five years, but that such agreement not having been reduced to writing, he was, under the statute of frauds, but a tenant at will. The agreement was made and the renting commenced in 1850, and he held the property until 17th February, 1852, when he says he delivered the premises to the plaintiff or his agent. He admits his liability for four months and seventeen days' rent, ending 17th February, 1852.

The answer discloses an actual holding from some time in 1850 until February, 1852, under a parol agreement or lease for five years. A parol lease, though by the statute of frauds declared to create a tenancy at will, has the effect of creating a tenancy from year to year, such being the established construction of the statute of 29 Car. 2, chap. 3, from which our statute is taken. *Clayton v. Blakely*, 8 Term Rep. 3. Such is the effect of the holding at an annual rent, as admit-

ted in this case, for a period extending through parts of three years.

2. The defence set up or attempted to be stated in the answer, if really there is any defence intended to be made seriously, is a surrender by the tenant and acceptance by the landlord. The acts of the parties may effect a surrender by operation of law without writing. R. C. 529, sec. 2. The actual change of the possession from the lessee to another tenant, and the acceptance of rent from him by the landlord, operates a surrender. So it has been said that an actual change of possession, by mutual consent of landlord and tenant, will amount to a surrender of the term, by act and operation of law. But it is evident that, to effect such surrender, there must be the consent of all the parties, and this consent may be shown by acts of the landlord and tenant, which conclude them on the question of consent. In the present case, the answer of the defendant says that "he left the house and delivered the possession thereof to the plaintiff or his agent." Does this language sufficiently state the facts which constitute a surrender? The whole allegation is of acts done by the defendant, but whether with the consent of the plaintiff or not is not stated. The fact that the plaintiff accepted the possession of the property with the purpose of holding it discharged of the tenancy, is not stated. The whole that the defendant alleges is, that he delivered the possession to the plaintiff or his agent. Now his act, without the consent of the plaintiff to accept the possession and discharge the defendant as his tenant, did not amount to a surrender. This is like the plea of accord and satisfaction, in which it is necessary to aver the acceptance of the thing in satisfaction of the plaintiff's demand. The defence consisted of the delivery, and the acceptance in satisfaction, according to the agreement of the parties.

The defendant's answer being insufficient, leave ought to have been given to amend, if the defendant had not cut himself off from such leave by his answer to the question propounded by the court. When the attorney asked leave to

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amend the answer, the court desired to know in what particular he proposed to amend, and he stated that "it was simply as to what already, as he was of opinion, sufficiently appeared in the answer, to-wit, the delivery of possession to defendant." The record, it may be supposed from the context, uses the word "defendant," in this last sentence, by mistake, instead of "plaintiff." The attorney evidently did not propose to make any substantial amendment, by stating any act of the plaintiff in accepting or using the premises surrendered by the defendant, or he would not have insisted that the answer, when amended as proposed, would contain no other statement of fact than what already appeared in it. With this view of the application to amend, it was properly refused.

The judgment is affirmed.

THE ST. LOUIS MUTUAL FIRE & MARINE INS. CO., Respondent,
vs. BOECKLER *et al.*, Appellants.

1. Under the charter of the St. Louis Mutual Fire and Marine Insurance company, assessments may be made after the expiration of a policy for losses incurred during its continuance.
2. When it is stipulated that a cause shall be decided in the supreme court upon the facts found by the court below, no other facts will be considered than those contained in the finding.
3. The company, under its charter, is entitled to retain a premium note until all losses liable to be assessed against it are paid.
4. Under that charter, if a member fails to pay an assessment within thirty days after publication of notice, the company may recover the whole amount of the premium note.

Appeal from St. Louis Law Commissioner's Court.

This was a suit instituted by the respondent on the 22d of December, 1852, against the appellants, upon the following premium note:

"\$150.

"For value received in policy dated May 26, 1851, insured

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by the St. Louis Mutual Fire and Marine Insurance company, we promise to pay said company (or their treasurer for the time being,) the sum of one hundred and fifty dollars, in such portions, and at such time or times as the directors of said company may, agreeably to the act of incorporation, require.

“BOECKLER, HIRSCHBERG & Co.”

The record contains a stipulation by the respective counsel that the case shall be submitted to this court upon the facts found by the court below, which were substantially as follows :

That on the 26th of May, 1851, the defendants effected an insurance for one year from that date, and executed to the company the note sued upon; that during the continuance of their policy, the company sustained losses amounting to upwards of fifty-one per cent. of the premium notes against which they were liable to be assessed; that after the expiration of the defendants' policy, and on the 15th of July, 1852, the company made an assessment of twenty per cent. upon the premium notes given by the defendants and the other members of the company; “that notice of said assessment was given in one or more newspapers published in the city of St. Louis, the first publication of which was on the second or third day after said assessment was made, and said notice was continued in said papers until the 1st of September, 1852, and notice was also sent to the defendants;” that before this suit was instituted, the defendants tendered to plaintiff the amount of the assessment of twenty per cent., upon condition that the premium note was delivered up. Plaintiff refused to accept the tender and deliver up the note.

Upon these facts, the court gave judgment for the plaintiff for the full amount of the note, less fifteen dollars paid when the same was given, and the defendants appealed. The charter of the company may be found in the session acts of 1851, p. 80. Its provisions, so far as they bear upon the questions in this case, sufficiently appear in the opinion of the court.

C. B. Lord, for appellants. 1. The appellants are not liable for any assessments made after they ceased to be mem-

St. Louis Mutual Fire & Marine Ins. Co. v. Boeckler.

bers of the company. See charter, secs. 2, 10, 13, 18. 2. They are not bound to pay or contribute towards any losses until assessment duly made in accordance with the charter. Secs. 18, 12, 13. Art. 3, sec. 1 of by-laws. 3. Upon tendering the assessed amount due for losses, their policy having expired, they were discharged from all obligation to the company. Secs. 10, 13. 4. The respondent is not entitled to recover the whole amount of the note. The whole amount is to be collected only upon neglect or refusal of a member to pay the sum *assessed*. Sec. 18. There was no assessment beyond the twenty per cent. which appellants offered to pay.

Krum & Harding, for respondent.

GAMBLE, Judge, delivered the opinion of the court.

The defendants having given their note to pay the plaintiff the sum of \$150, "in such portions, and at such time or times as the directors of said company may, agreeably to their act of incorporation, require," several points have been presented in their behalf for the reversal of the judgment, which was given against them for the whole amount of the note.

1. It is insisted that, by effecting insurance with the plaintiff, the defendants became members of the company during the continuance of their policy and no longer, and that, after they ceased to be members, no assessment could be made against them, even on account of losses happening while they were members.

It is true that, by the second section of the charter, a person effecting insurance with the company continues a member only so long as the policy lasts, but such membership is not a necessary ingredient in the liability of those who have given their notes to the company on becoming members. The notes bind the parties who are makers to pay the money on calls made in pursuance of the charter, and the tenth section of the charter provides that, "at the expiration of the term of insurance, the note or such part of the same as shall remain unpaid

after deducting all losses and expenses accruing during said time, shall be given up to the signers thereof. The note is to be given up at the expiration of the policy, after deducting losses and expenses happening during its continuance. The note continues obligatory, so far as losses happened during the term of insurance. The twelfth section makes every member responsible for his proportion of losses happening to the company. These defendants were liable to the company for their proportion of the losses happening while they were members, and they were entitled to have their note surrendered, only when their proportion of those losses was paid. The finding of the court is, that a large per cent. of the amount of the note was required to pay such losses. The 18th section directs the proceedings to be adopted by the directors in making assessments upon the members to meet losses. Although the word "member" is used in the section, it embraces, by the context of the section, all who have become members of the company by insuring therein, and who are liable for a proportion of losses occurring while their insurance continued, whether their membership has ceased or not. The assessment for losses may then be made after the membership ceases.

2. It is insisted that the finding by the law commissioner does not show that notice of the assessment made upon defendants' note, was duly published. The 18th section requires that, after a loss occurs, the directors "shall settle and determine the sum to be paid by the several members, as their respective proportion of said loss, and publish the same in such manner as they shall see fit, or as the by-laws may have prescribed, and the sum to be paid by each member shall always be in proportion to the amount of his premium note, and shall be paid to the treasurer within thirty days next after the publication of said notice. The record shows that the parties have agreed that the case shall be determined upon the facts found by the law commissioner and his conclusions of law pronounced thereon. He finds nothing about by-laws in relation to notice, and he finds a publication of notice which conforms to the charter.

The question as to the conformity of the notice to a by-law does not arise on the finding.

3. The defendants claim that, having tendered the amount now assessed, upon condition that their note should be surrendered to them, they were not liable to this action, although the finding of the court shows that there are still other losses which happened during the period of the defendants' insurance, for which no assessments have yet been made.

When we determine that the defendants continue liable upon their note for their proportion of losses happening while their insurance continued, and that assessments for such losses may be made after the expiration of their policy, it follows that they were not entitled to their note, until all the losses for which they were liable were satisfied, and consequently, their tender was upon a condition they had no right to impose.

4. It is insisted that judgment was improperly rendered for the whole amount of the note, after deducting a payment of fifteen dollars, made when the insurance was first effected.

The 18th section of the charter expressly provides that, upon a failure to pay any assessment upon a note, the whole amount of the note may be recovered in an action upon it, and that the amount thus recovered shall remain in the treasury of the company, subject to the payment of losses that may thereafter accrue, and the balance, if any, shall be returned to the party from whom it was collected, on demand, after thirty days from the term for which insurance was effected. There are several provisions of this charter which appear to be incongruous. It is evidently the design of some of the sections to make every person insuring in the company a partner or member—responsible for his share of losses happening while he was a member, and yet it is plainly within the contemplation of other sections, that his liability should be ascertained and settled within the period of thirty days from the expiration of his policy. We take the chief design of the act to be, to form an association for mutual indemnity, in which each member shall be liable for his proportion of losses happening while he con-

Smith v. Schibel.

tinues a member, enjoying the benefits of the indemnity against loss on his part, and that the provisions about time are secondary and subordinate to this main design of the act. Construing the act, then, "liberally to effect the ends and purposes thereby intended and contemplated," as we are directed in the 27th section, we hold that a party failing to pay an assessment, when made, is liable to pay the whole amount of his premium note, notwithstanding the provision that the note is to be returned to him on demand, after thirty days from the expiration of his policy.

The judgment is, with the concurrence of the other judges, affirmed.

SMITH, Defendant in Error, *vs.* SCHIBEL, Plaintiff in Error.

1. Walker v. Mauro, 18 Mo. Rep., 564, affirmed.

Error to St. Louis Law Commissioner's Court.

The petition of Smith, the plaintiff below, stated that Schibel, the defendant, was indebted to Charles Luciane on account of borrowed money, and that Luciane assigned his claim to Selar Simons, who assigned the same to the plaintiff. The plaintiff prayed judgment. A demurrer to this petition being overruled, the defendant sued out a writ of error.

H. N. Hart, for plaintiff in error.

Blennerhasset & Shreve, for defendant in error.

GAMBLE, Judge. In the case of *Walker v. Mauro*, decided at this term, it was held that, under our code, which blends law and equity, the assignee of a debt may maintain an action in his own name. This case appears to come within the same principle. The defendant demurred to the petition, and the demurrer was overruled. No other point appears to be presented than the question, whether a debt or account may be assigned,

Jarbee v. Steamboat Daniel Hillman.

and whether the assignee may sue in his own name, under the code. The judgment is, with the concurrence of the other judges, affirmed.

JARBEE & BELT, Defendants in Error, vs. STEAMBOAT DANIEL
HILLMAN, Plaintiff in Error.

1. A warrant against a boat issued in the name of one of the plaintiffs only. Upon a motion, filed after the seizure and sale of the boat, to quash the writ and all proceedings, *held*, that the writ might be amended and would be considered as amended. *Jones v. Cox*, 7 Mo. Rep. 173, affirmed.

Error to St. Louis Court of Common Pleas.

C. B. Lord, for plaintiff in error.

Hudson & Thomas, for defendants in error.

GAMBLE, Judge, delivered the opinion of the court.

The plaintiffs filed their petition against the Daniel Hillman, and on that petition, the clerk issued a warrant in the name of Belt alone. The boat was seized and sold, and some of the creditors proved their claims, when a motion was made to set aside the order of sale and all proceedings, for the alleged irregularity in the writ, in being in the name of only one of the plaintiffs. The court overruled the motion and the plaintiffs excepted, and bring the case here.

1. The case of *Jones v. Cox and others*, 7 Mo. Rep. 173, presented the same question on a motion to quash a writ, and there it was held, that such defect was amendable, and the motion properly overruled. It is said in that case: "If a variance between the declaration and writ can be taken advantage of at all, it is not seen upon what principle the party can avail himself of it on a motion to quash. According to our practice, the declaration is filed before the writ issues, and the declara-

Walsh v. Edmonson's Ex'r.

tion being the foundation of the writ, and accompanying it, the party would look to it in order to ascertain the nature of the demand, and by whom the suit was instituted. A variance between it and the summons cannot mislead him." If an actual amendment of the writ were necessary, we would send the case back, with directions to allow it to be amended, but as the actual insertion of the name of Jarbee in the writ would be of no importance, when it appears in the petition upon which the writ issued, the judgment is, with the concurrence of the other judges, affirmed.

WALSH *et al.*, Defendants in Error, *vs.* EDMONSON'S EXECUTOR, Plaintiff in Error.

1. A finding of facts is necessary on the trial by a circuit court of a cause appealed from a county or probate court.

Error to St. Louis Circuit Court.

Walsh and others presented to the Probate Court, for allowance, a demand against the estate of B. B. Edmonson, deceased, for an amount assessed to him upon the adjustment of a general average, for loss and damage to the steamboat Marshal Ney and cargo. The demand being allowed in the Probate Court, the executor appealed to the Circuit Court, where, on a trial by the court without a jury, judgment was again given for the plaintiffs. The court did not find the facts, as required by the new practice act. The case is brought to this court by writ of error.

T. T. Gantt, for plaintiff in error.

Haight & Shepley, for defendant in error.

GAMBLE, Judge. We have already held, in *Boyle et al. v. Skinner*, decided at the present term, that the provision of the code which requires the court, when trying a case without a

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jury, to make a decision in writing, stating first the facts and then the conclusions of law thereon, does not apply to a case pending in a court by appeal from a justice of the peace. That decision is founded upon the 6th section, article 30, of the code, which declares that the act shall not apply to proceedings or actions before justices of the peace. The present case is an appeal from the Probate Court, tried by the Circuit Court without a jury, and in which, no decision was given in conformity with the code by finding the facts. In relation to such cases, the rule of the code must be followed. The judgment will therefore, for want of such finding, be reversed, and the cause remanded.

ALEXANDER, Defendant in Error, *vs.* MOORE, Plaintiff in Error.

1. A. made a parol contract with J. T. for the delivery of a certain number of beef cattle, and, pursuant to the contract, deposited with G. money in part payment. The receipt given by G. stated that the money was deposited on a contract made with W. T. Held, it might be shown by parol evidence, for the purpose of taking the contract out of the statute of frauds, that the money was in reality deposited for J. T.; that this amounted to nothing more than proving a part payment by parol evidence.

Error to St. Louis Court of Common Pleas.

R. M. Field, for plaintiff in error. 1. The contract on which the plaintiff relied was void by the statute of frauds. It was not pretended that any written contract existed, except what was contained in the certificate signed by Greely & Gale. Conceding that they were the agents of both parties, competent to bind them, the contract was not with the plaintiff but with a different person. *Champion v. Phummer*, 1 N. H. Rep. 252. *Sherburne v. Shaw*, 1 N. H. Rep. 157. *Nichols v. Johnson*, 10 Conn. 192. Where a broker makes a contract for his principal, but the broker's name is inserted in the me-

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morandum, the principal cannot recover upon it. *Shaw v. Finney*, 13 Metcalf, 453. 2. The application of the payment to Greeley & Gale to a different contract than that mentioned in their certificate, not only contravened the statute of frauds, but a settled rule of the common law, that no parol evidence shall be admitted to contradict or vary the written contracts of parties. Besides, there was, in truth, no evidence whatever adduced that Moore made the payment on any other contract than that mentioned in the certificate.

F. M. Haight, Leslie & Barrets, for respondent. 1. The principle that a mistake in the christian name may be explained by parol evidence is applicable. 10 J. R. 133. 9 Cow. 140. 7 ib. 13. 12. J. R. 77. 13 J. R. 518. 2. Payment of the money to Greeley & Gale was a compliance with the contract and the only contract made. The receipt of G. & G. could be explained by parol evidence. No writing was necessary; all that was necessary was payment of money on the contract.

SCOTT, Judge, delivered the opinion of the court.

The petition claimed damages of Moore, the defendant, for refusing to receive one hundred head of beef cattle, alleged to have been bought by Moore of John T. Alexander, the plaintiff.

The answer denied that the defendant had made any contract with the plaintiff.

A man by the name of Hickman went to the farm of the plaintiff, in the state of Illinois, and through the brother of the plaintiff, made a contract with him for the delivery in St. Louis of one hundred head of beef cattle at a stipulated price. This agreement was made subject to the condition that Hickman's partner in St. Louis should be satisfied with the price; if he should be, five hundred dollars were to be deposited with Greeley & Gale, and the plaintiff was to be notified thereof by telegraph. The sum agreed upon was deposited with Greeley &

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Gale by the defendant, who took from them a certificate of deposit, as follows :

“ Received of John T. Moore & Co., five hundred dollars, which amount will be paid to William Alexander, of Illinois, provided he deliver, within fifteen days from this date, to the above named firm of J. T. Moore & Co., at St. Louis, one hundred head of beef cattle ; in case of default thereof, then the above named five hundred dollars to be refunded to the said Moore & Co., on the return of this certificate. When we are called upon for the above five hundred dollars by Mr. Alexander, the amount is to be paid on return of this document.

“ GREELY & GALE.

“ St. Louis, June 20, 1851.”

After this, the plaintiff received a telegraphic dispatch from Moore, to the effect that five hundred dollars had been deposited for William Alexander with Greely & Gale, on account of the cattle contract. This dispatch was addressed to William Alexander. A dispatch of the like tenor was addressed by Greely & Gale to William or James Alexander. James Alexander was the agent for the plaintiff, and had made the contract with Hickman for the plaintiff. Upon the receipt of these dispatches, the plaintiff immediately drove his cattle to St. Louis and offered them to the defendant, who declined receiving them, saying that he had made no contract with *John T. Alexander* ; that his agreement was with William Alexander. So soon as the cattle reached St. Louis, they were levied on by the United States marshal, by virtue of an execution against *William Alexander*. After being detained some days, they were delivered by the marshal to the plaintiff, to whom they belonged. In the mean time, the cattle had depreciated in value, and were sold for a less sum than that agreed to be paid by the defendant. This action is brought to recover the loss sustained by the breach of this contract.

1. The defence rested on the statute of frauds and perjuries ; that there was no valid contract proved between the parties ; that no parol proof ought to be regarded by the jury, to the

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effect that the deposit was made on the behalf of any other person than William Alexander, the person named therein. The court refused instructions to this purport, and directed the jury, in effect, that if the contract was made with the plaintiff, and \$500 were deposited on account thereof, and the plaintiff offered to comply with his part of the agreement, and the defendant refused, they would find for the plaintiff.

There was a verdict for the plaintiff, on which judgment was entered up. The misdirection of the judge is the error relied on.

This case wears very much the aspect of a conspiracy on the part of the defendant and others, to deceive the plaintiff; to cause him to bring his property to a place where it might be seized on execution in another state, to satisfy the debt of another, and to furnish evidence against himself that his property did not belong to him.

By express enactment, the payment of part of the purchase money takes a contract out of the statute of frauds and perjuries. Although the name of William Alexander was inserted in the certificate, the facts furnish no pretence that any contract was made with him, and it was very properly left to the jury, whether the contract was not with the plaintiff, and whether there was not a part payment of the purchase money. If a man makes a contract with another, and informs him that he has deposited money on the contract, the fact that he misnames the promisee, in a notice of having made payment, or his having the name of another inserted designedly or fraudulently in the receipt which he takes from the person with whom the money is left, can avail him nothing. To enable the plaintiff to recover, it was only necessary to show a contract and a part payment of the purchase money. As the defendant notified the plaintiff that there was a part performance, and as there was in fact a receipt, it matters not what names were used by him in having the instrument prepared. The thing is the making of the payment. This may be proved by parol, notwithstanding there is written evidence of it, and surely the admission of

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the defendant that it was on account of the plaintiff, was sufficient. As the contract was, in fact, made with the plaintiff, and as he was, in fact, notified of the payment in pursuance to its terms, it cannot matter what names were employed in the paper. His conduct may have thrown difficulties in the way of the plaintiff, in obtaining the deposit from Greely & Gale, but that makes no difference. The principle, that parol evidence cannot be received to contradict the sense of a written contract, has no bearing on this case. The contract was a parol one. The only question was, whether there was a part payment. That fact may be shown by parol, and the evidence clearly warranted the verdict. The receipt was not necessary testimony to prove the contract, but the payment, and no principle is clearer than that a written receipt is open to the explanation of parol evidence.

The other judges concurring, the judgment will be affirmed.

GUEST *et al.*, Plaintiffs in Error, *vs.* FARLEY, Defendant in Error.

1. A deed of bargain and sale, for a valuable consideration, in trust for the use of the wife of the bargainor during life, and her heirs in fee simple, raises a use in the bargainee, and the second use is not executed by the *statute of uses*, even though the consideration may have moved from her to whom it was limited.

Error to St. Louis Court of Common Pleas.

T. Polk, for plaintiff in error. 1. The deed upon which this controversy arises was executed subsequent to the introduction of the common law and the British statutes anterior to the fourth year of the reign of James I. The statute of uses (27 Henry VIII) was therefore in force. It is well settled that the statute of uses only executed the first use, where a use was limited upon a use. The second use was left unexe-

cuted and was called a trust. 1 Cruise's Dig. Trusts, ch. 1, §4. 2. This was a deed of bargain and sale for a valuable consideration, which, by the statute of uses, raise a use in the bargainee. The statute of uses then has operated in this case by transmitting the title to the trustee, and the second use to the *cestui que trust* remains unexecuted. 3 Cruise's Dig. tit. 32, Deed, ch. 9, §2, 3, 4, 5, *et seq.* 3. Again, this deed conveys the land to a trustee for the separate use of a married woman for life, &c. In such case, the statute does not execute the use, even if it be raised by devise and not by deed. 1 Cruise's Dig. tit. 12, ch. 1, §15, 17, 19. 5 Mod. 63, 101. 1 Salk. 228.

W. L. Williams, for respondent. This is a deed of bargain and sale; but it does not appear from its face that the money consideration was paid by the grantee. If the deed was for a *good* consideration only, the use was executed in the person who called it forth. The consideration here is "love and affection for the wife," and had it stopped there, the statute would have executed the use in the wife. But it has the further consideration of "\$500 in hand paid." It does not say that it was paid by the grantee. Now the irresistible inference is, that it was paid by the wife. If so, the use was executed in her. Another view of the case is this. The object of this deed was evidently to secure the use of the property to the grantor's wife. The wife being dead, the objects of the trust have been met, and there is no further use of any trust estate. It therefore became extinct, and the trust and legal estates became united in the heirs of Mrs. Labross. 1 Barn. & Ald. 336. 2 Tucker's Comm. 43.

SCOTT, Judge, delivered the opinion of the court.

This was an action of ejectment, begun in 1848, by the plaintiffs in error, who were plaintiffs below, against the defendant, for a lot of ground in St. Louis. The plaintiffs submitted to a nonsuit and sued out this writ of error.

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Francis Jourdan being the owner of the lot in dispute, on the 4th of March, 1818, conveyed it to Edward S. Gantt, by deed, a part of which is here copied: "This indenture made by and between Francis Jourdan, alias Labross, of the town of St. Louis and Territory of Missouri, of the one part, and Edward S. Gantt, of the other part, witnesseth: that the said Francis Jourdan Labross, for and in consideration of the love and affection he entertained for his dear wife, Sarah R. Labross, and for the further consideration of five hundred dollars to him in hand paid, the receipt whereof he doth hereby acknowledge, hath given, granted, bargained and sold, and by these presents doth give, grant, bargain and sell unto the said Edward S. Gantt, his heirs and assigns forever, the following lot," &c. This conveyance was in trust for the use of the above named Sarah R. Labross, during her natural life, and in trust for the heirs of the said Sarah, in fee simple.

Gantt, the trustee, had departed this life before the bringing of the suit, and the plaintiffs are his heirs at law.

1. It will be seen that the deed was executed after the introduction of the common law and British statutes. The statute of uses was not formally enacted in this state until the year 1825. It seems to be the established doctrine, that English statutes, passed prior to the fourth year of James I, and applicable to our situation, and in amendment of the law, constitute a part of the common law of this country. Under the influence of this principle, it has been held in several states, that the statute of uses, 27 Henry VIII, became a part of the common law of those states. We see no reason for departing from this rule, in the construction of our statute introducing the common law and English statutes. Indeed, the point was not controverted in the argument of the case.

This suit was brought before the enactment of the late code; consequently it was proper to institute it in the name of those who held the legal title to the lot. In making this remark, we do not wish to be understood as expressing an opinion as

to the manner in which the suit should have been brought under the law now in force.

It was contended for the defendant that, as the deed was expressed to be made for love and affection of the wife, and for the further consideration of five hundred dollars, it may be presumed that, as part of the consideration was for love of the wife, that the \$500 also was paid by her, it not appearing expressly by whom it was advanced; consequently that the use, under the statute, would be executed in the wife and not in Gantt, the trustee.

Without endorsing the correctness of the inference attempted to be drawn from the words of the deed, that the consideration money was advanced by the wife, and even admitting that it was paid by her, the received construction of the statute would not warrant the conclusion that a use was thereby raised in her. In a bargain and sale, the consideration of love and affection will not raise a use. No use arises without a valuable consideration. Lord Coke says: "A bargain and sale is a real contract upon a valuable consideration for passing lands by deed indented." 2 Inst. 672.

The statute only raises a use in the bargainee. Sanders says, "it is the consideration which directs the use to the bargainee, and the parties could not declare it to any other person, even if they were inclined to do so." Sanders, 313, 315. Afterwards, he says, "that there is no necessity that the bargainee himself should pay the consideration money, for if it is paid by a stranger, it will be sufficient to raise the use in the bargainee; therefore, if a man, in consideration of a certain sum paid by B., bargains and sells his lands to A. for life, remainder to C., in fee, this is good, for, though A. and C. themselves did not pay the consideration, yet it is clear that it was paid upon their account, or if, in this case, the bargain and sale had been to B. for life, with many remainders over, the consideration might well extend to those in remainder." Ib. 341. 2 Inst. 672. 2 Rolle's abr. 784, pl. 6.

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As there was a use raised in the bargainee, no use could be limited to arise out of the estate of the bargainee, for that would be to limit a use to arise upon a use. The statute only executes the first use. A use upon a use is no estate at law; it is only a trust, a creature of the courts of equity. Then, even if the consideration had passed from Mrs. Labross, yet it could not raise a use in her, which courts of law would recognize. It was no legal estate; it was a mere trust, a thing only dealt with by courts of chancery. Sanders, 315. 2 Dyer, Tyrrel's case, 151, (a.) 1 Leon. 147-8.

As to the view suggested, that the wife is dead, and there being no longer any use for a trust estate, it is extinct; it may be answered that such a consideration could only have weight when urged by a *cestui que trust*. The defendant is a stranger, and he has no right to insist on such a defence. With the concurrence of the other judges, the judgment is reversed and the cause remanded.

PATCHIN, Respondent, vs. WEGMAN, *et al.*, Appellants.

1. Affidavit by a party that he authorized his attorney to accept an offer of compromise, and supposed that he had done so, and so gave the suit no attention, is no ground for a new trial.

Appeal from St. Louis Law Commissioner's Court.

Action against a constable and his securities for a false return of an alias execution issued by a justice of the peace.

Blennerhasett & Shreve, for appellants. A justice, having no powers except those given him by statute, cannot issue an *alias* execution.

H. N. Dedman, for respondent.

GAMBLE, Judge. The law commissioner proceeded to try this case in the absence of the defendants, the plaintiff being

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present and waiving a jury. The case came to this court by appeal from a justice of the peace. No bill of exceptions was taken at the trial, and of course, no question of law then arising is saved upon the record. After the judgment, the defendants asked for a new trial, and filed an affidavit, stating that the defendant, Wegman, who is the principal in the bond sued upon, was informed by his attorney that the case could be settled for ten dollars, and that he had authorized his attorney to give that sum and compromise the case. Supposing it was so settled, he gave himself no further trouble about the suit, and only discovered his mistake after the judgment was rendered. He swears to merits. The motion was overruled.

The affidavit shows no case upon which a new trial should have been granted. The judgment is, with the concurrence of the other judges, affirmed.

PAYNE, Appellant, vs. CLARK & BROS., Respondents.

1. If there is a discrepancy between the amount stated in the body of a certificate of deposit and that stated in the margin, the former will prevail, and if the certificate is declared upon as for the amount in the margin, it is no error to instruct that the plaintiff cannot recover, although the defendants in their answer acknowledged their indebtedness for the amount stated in the body.

Appeal from St. Louis Circuit Court.

A. Buckner, for appellant.

Haight & Shepley, for respondents.

RYLAND, Judge, delivered the opinion of the court.

The plaintiff's petition states that he deposited in the banking house of Clark & Bros., the sum of \$1414; \$404 of this sum being in currency, and the balance, \$1010, in cash; and

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that, at the time of making the deposit, the defendants executed and delivered to him a certificate of deposit, as follows :

“Banking House of E. W. Clark & Bros.

“No. 760. “St. Louis, Mo., 26th Feb’y, 1851.

“L. P. Payne has deposited in this office, one thousand and fourteen dollars, (in funds as below,) payable to order of himself on return of this certificate, sixty days after date, with interest at the rate of six per cent. per annum.

“\$1014.	“Currency,	-	-	-	\$404
	“Cash,	-	-	-	1010

\$1414

“E. W. CLARK & BROS.”

The petition alleges that the defendants, by mistake, inserted \$1014, where they ought to have inserted \$1414 in the body of said certificate. He states that, after the expiration of two months, he presented said certificate of deposit for payment and it was refused.

The defendants deny, in their answer, that plaintiff ever deposited \$1414 with them, but admit the deposit of \$1014. They admit that the certificate of deposit set forth in the petition was executed by them, and allege that the \$1010 opposite the word “cash,” was a mistake and ought to have been \$610, which was the true and correct sum, and that the sum of \$1014 was the true and real amount deposited; and that they offered to pay that sum to plaintiff, and were always ready to pay that sum.

On the trial, the plaintiff read the certificate of deposit and then rested his case.

The defendants then asked the following instruction : “The jury are instructed that, upon the case as made, the plaintiff is not entitled to recover;” which instruction was given. The plaintiff thereupon suffered a nonsuit, which he afterwards moved to set aside, and failing in his motion, he brings the case here by appeal.

1. The plaintiff complains of the instruction given to the

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jury. In the opinion of this court, the instruction was proper. The plaintiff declared on a certificate of deposit for \$1414; he alleges that he deposited that amount with the defendants. To support his petition, he presents the certificate above set forth, which cannot be said to be a certificate for \$1414, but is a certificate for \$1014. He failed entirely to prove the allegation as to the certificate and amount declared on, and it was right for the court to say, from the case made by plaintiff himself, he could not recover.

This view of the case depends upon the certificate of deposit being only for \$1014, and not for \$1414. Let us see what the authorities are upon this subject.

The sum of one thousand and fourteen, (in funds as below,) dollars, is written on the face of the certificate in words. On the left hand of the certificate is the mark, \$1014. Above the name of Clark & Bros. is the memorandum :

" Currency, - - - - -	\$404
" Cash, - - - - -	1010

"\$1414"

The defendants contend that this is a certificate calling only for \$1014. The plaintiff contends that it calls for \$1414, and that the memorandum "in funds as below," with the currency, \$404 and cash, \$1010, controls the other words and makes it for \$1414. Chitty on bills, 149, says : "there is no absolute necessity for the superscription of the sum for which the bill is payable, provided it be mentioned in the body of the bill ; but the superscription will aid an omission in the body, and it is now the usual mode to superscribe the sum payable in figures at the head of the instrument, and in words in the body of it. If there be a discrepancy between the sum in the body of the bill and the superscription, the former will prevail." Again, at page 160, of the same treatise ; "if the sum in the superscription of the bill be different from that in the body of it, the sum mentioned in the body will be taken as the sum to be paid *prima facie*."

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Story on bills is to the same point. He says: "the sum is sometimes expressed in figures in the superscription, as well as in the body of the instrument in letters, for greater caution. But if the sum in figures, on the superscription, differs from the sum in words in the body of the instrument, the latter will be deemed the true sum; and parol evidence is inadmissible to establish that the sum intended was not that stated in words in the body of the instrument, but was that stated in the margin in figures." In the case of the *Norwich Bank v. Hyde*, 13 Conn. Rep. 282, Williams, C. J., in delivering the opinion of the court says: "The aid, then, the margin is to give, is to remove an ambiguity in the body of the instrument, or to clear up a doubt, not to supply a blank. The body of the instrument must be our guide." He referred to *Elliot's case*, in Leach C. L. 185. There the note, in the body of it, was for fifty ———, in the margin £50. The margin helped out the body; it was able to remove the ambiguity. Yet, in this case of *Elliot's*, the judges would not decide, even with the aid of the margin, that, as a matter of law, the note was for £50, but that was properly left to the jury. There is a class of cases where memoranda are made upon notes and bills, and a question has arisen how far these memoranda become part of the instrument, such as the following on a note: "payable at Messrs. B. & Co., bankers, London." It was held that this did not make part of the contract. 10 Barn. & Cress. 2. Where the evidence declared against the maker of a promissory note, that he made the same payable at the house of Messrs. B. & Co., London, and, upon production of the note at the trial, it appeared that the address at the house of Messrs. B. & Co. was not a part of the note, but only a memorandum at the foot of the note, it was held that this was a variance. *Exon v. Russell*, 4 Maule & Sel. 505.

In *Saunderson et al. v. Piper et al.*, 5 Bing. Rep. (new cases,) 425, a bill of exchange was expressed in figures to be drawn for £245, in words for £200, value received, with a

stamp applicable to the higher amount : held, that the evidence, to show that the words "*and forty-five*" had been omitted by mistake, was not admissible. Tindall, C. J., said : "The evidence in question being inadmissible, we cannot shake the rule of commercial writers that, where a difference appears between the figures and the words of the bill, it is safer to attend to the words. If we take the authority of these writers, where we have none of our own, this is a good bill for the sum expressed in the body."

Bosanquet, J., said : "The argument that pressed me the most is the rule of *fortius contra proferentem*; that an instrument must be taken most strongly against the party making it. But there is no case in which that principle has been applied to an instrument, the body of which expressed a clear amount, and the ambiguity arises from a different amount expressed in the margin. Under such circumstances, the rule of law, as to evidence, must prevail.

Erskine, J., said : "I am of opinion, that the words in the body must be taken as containing the amount of the bill to be paid ; for, according to the authorities, figures are not of the same authority as words in the body of a bill, except in cases where the margin does not contradict, but is only an index to the body, as in the case of *Rex v. Elliot*, above cited.

Marius lays it down : "If it so fall out that, through unadvisedness or error of the pen, the figures of the sum and the words at length of the sum that is to be paid upon any bill of exchange, do not agree together, either that the figures do mention more and the words less, or that the figures do specify less and the words at length more, in either or in any such like case, you ought to observe and follow the order of the words mentioned at length and not in figures, *until further order be had concerning the same*, because a man is more apt to commit an error with his pen, in writing a figure, than he is in writing a word ; and also, because the figures at the top of the bill do only, as it were, serve as the contents of the bill, and

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a breviat thereof, but the words at length are in the body of the bill of exchange, and are the chief and principal substance thereof, whereunto special regard ought to be had."

Applying the rules of decisions in cases of bills of exchange to this certificate of deposit, and it is only obligatory for \$1014. It promises to pay this sum, and this must control the specification of funds at the bottom. The sum in the margin is for \$1014. The sum in words, in the body of the certificate, is the same, and it will be contrary to the rules and authorities of courts of high character, in England and in the United States, to let the memorandum, specifying the funds in which the deposit was made, and the amount thereof in figures, control the body of the instrument and the margin of the instrument too. The judgment of the court below is affirmed, with the concurrence of the other judges.

BLAISDELL, Appellant, *vs.* STEAMBOAT WILLIAM POPE, Respondent.

1. A return to a writ against a boat which omits to state that the officer seized the boat is defective.
2. It is not too late to amend the return after motion filed to set aside the judgment. *Maulsby v. Farr*, 3 Mo. Rep., overruled.
3. The officer who executed the writ may amend his return, although when leave is given to amend, he has ceased to be the officer of the court.
4. It is not necessary for the officer to state in his return that he retains the boat in custody.

Appeal from St. Louis Law Commissioner's Court.

P. B. Garesché, for appellant.

M. L. Gray, for respondent.

GAMBLE, Judge, delivered the opinion of the court.

1. The officer having a writ to seize the boat William Pope, made his return upon it in these words: "Executed this writ in the county of St. Louis, by going on board the steamboat

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Wm. Pope and offering to read the writ and petition to Selar Simons, captain ; also by leaving a true copy of this writ and petition at the usual place of abode of Oliver Harris, with a white person of the family, above the age of fifteen years. February 22, 1853. This return is defective in not stating that he had seized the boat.

A judgment was rendered by default and damages assessed. A motion was made to set aside the judgment, and, pending that motion, upon leave given by the court, the return of the officer was amended by stating that he had seized the boat.

A new motion was made to set aside the judgment, upon the grounds that the original return of the officer not showing that he had seized the boat, the court had not jurisdiction to proceed in the cause ; that the amendment was improperly permitted, because a motion was at the time pending to set aside the judgment, on account of the defect in the return ; that the amendment in the return was improperly made, because the officer who had executed the process had been superseded by an act of assembly which made the marshal of the county the officer of the law commissioner's court. It was also insisted that the return, as amended, was insufficient to sustain the jurisdiction of the court, because it did not state that the officer retained the boat in his custody.

The law commissioner sustained the motion of the defendant to set aside the judgment, and dismissed the case for want of jurisdiction. The case is brought here by writ of error, and the same objections to the jurisdiction of the court are made here.

2. The case of *Maulsby v. Farr*, 3 Mo. 438, is referred to, as sustaining the position that, after a motion to set aside a judgment for defect in a sheriff's return, it is too late to ask leave to amend the return. In that case, the amendment was not allowed, and the judge delivering the opinion of the court says, "that the application to amend came too late, as a motion to set aside the judgment was pending." But he proceeds further to say, that the amendment proposed to be made

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would not have helped the return. It would still have been insufficient. We do not assent to the correctness of the position that a motion to amend a return is too late after a motion made to set aside the judgment. Such motions to amend may be made even after error brought to reverse the judgment. *Irvine v. Scobee*, 5 Litt. Rep. 70. *Muldrow v. Bates*, 5 Mo. Rep. 214.

3. The fact that the officer who executed the writ was no longer the officer of the court, when leave was given to amend the return, is no objection to the amendment. In 7 Bac. Abr. 195, it is said: "If the return of the old sheriff happen to be erroneous, and a new sheriff be chosen, yet the court may cause the old sheriff or his under sheriff, clerk or deputy to amend the same."

4. The command of the writ that the officer seizing a boat shall keep her until discharged by due course of law, does not require that he should make such fact a part of his return. When he returns that he has seized the boat, the duties that the law imposes upon him in consequence of that act, need not be shown in the return, in order to give the court jurisdiction of the cause. If she has been sold under the statute, or has been released on bond, the officer ought to return such facts; but, in the absence of such statement, his return imports that he still has possession of the boat.

The court below erred in setting aside the judgment in this case, and that decision is reversed, with the concurrence of the other judges.

HOLMES, Plaintiff in Error, vs. HILL, Defendant in Error.

1. A contract will not be avoided by duress of imprisonment under legal process, unless there has been an improper use made of the process, either in wilfully employing it to imprison the defendant upon a demand that was groundless, or knowingly exaggerated, or unless there has been a subsequent abuse of the process, and an advantage gained thereby.

Error to St. Louis Court of Common Pleas.

N. Holmes, for plaintiff in error. 1. The first, second, third, fifth and sixth instructions asked by the plaintiff should have been given. 2 Greenl. Ev. §302. 5 Dane's Abr. 373, (ch. 158, §7 to 13, §22.) 2 Bac. Abr. 171, tit. Duress, A, and note. Com. Dig. tit. Pleader, 2 W, 19. Chitty on Con. 206-7 and notes. 1 Saund. Plead. and Ev. 44. *Watkins v. Baird*, 6 Mass. 711. *Waterman v. Barrett*, 4 Harr. 311. Where the suit is upon regular legal process, founded upon real demands, though for a larger amount than the plaintiff may finally succeed in recovering, and though the defendant may have off-sets, so as to reduce the amount claimed lower than the plaintiff had admitted, and the parties compromise and settle while the defendant is under arrest, and notes are given, such notes cannot be avoided on the ground of duress of imprisonment, notwithstanding the defendant would not have given them if he had not been under arrest. *Stouffer v. Latshaw*, 2 Watts, 165-170. 2. The fourth instruction asked for by the plaintiff should have been given. Story's Prom. Notes, §186. *Russell v. Cook*, 3 Hill, 504. *Shepard v. Watrous*, 3 Caines, 166. *Crowell v. Gleason*, 1 Fairf. 325-333. *Meek v. Atkinson*, 1 Barr, 84. These suits cannot be said to have been for "improper purposes," as in *Richardson v. Duncan*, 3 N. H. 511, where a criminal prosecution was used to extort money. 3. The instructions given for the defendant were erroneous.

Geyer & Dayton, for defendant in error. The note sued upon was given solely for the purpose of obtaining a discharge from an unlawful imprisonment, and not on account of any indebtedness in fact, or acknowledged by defendant; and although the process under which he was imprisoned may have been issued according to the forms of law, such imprisonment was none the less a duress, if the jury found there was no just cause of action, or that the cause of action, if any, was falsely magnified in amount, in order to prevent the defendant

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from procuring bail. An arrest for improper purposes, without just cause, or an arrest for just cause and under lawful authority, for an improper purpose, is duress, and even when money is paid in order to obtain a discharge, it may be recovered back. *Richardson v. Duncan*, 3 N. H. Rep. 308. *Severance v. Kimball*, 8 ib. 386. *Alexander v. Pierce*, 10 ib. 497. *Nbshay v. Ferguson*, 5 Hill, 159. 13 Maine, 146. Buller's N. P. 172. If the process is sued out for an improper purpose, as by exaggerating the amount, so as to require bail that cannot be given, and thereby coerce the party to terms, it is duress.

GAMBLE, Judge, delivered the opinion of the court.

Holmes brought his action of assumpsit against Hill on a promissory note made by Hill, payable to Edward Bloomer and by him endorsed to Holmes. Hill pleaded that the note had been obtained from him by Bloomer, the payee, by duress of imprisonment, and that Holmes, the endorsee, had notice of the fact. Although other special pleas were filed, upon which issues were formed, the defence relied upon was the duress.

In the evidence, it appeared that Hill, for several years prior to the making of the note, had contracts in relation to lumber with Robert and Edward Bloomer, and with a firm of J. Chamberlain & Co., of which the Bloomers were members; that these contracts were for large amounts, and that the parties had difficulties in relation to the contracts which resulted in law suits against each other; that in a suit in Wisconsin territory, the Bloomers had at one time recovered a verdict for \$4841 20 against Hill, and on a new trial, had obtained a verdict and judgment for \$6231 14, which had been reversed on appeal. Hill, who resides in St. Louis, being at Galena, in Illinois, in October, 1844, where the Bloomers resided, was sued there in two actions—one in the name of Edward Bloomer and the assignee in bankruptcy of Robert Bloomer, and the other in the name of the partners of the firm of J. Chamberlain & Co. In the first,

the amount of indebtedness sworn to was \$4422, and in the second, \$14,000, and bail was required in double these amounts. Hill being a stranger and unable to procure bail, was committed to jail. While in prison, he consulted counsel and was very desirous to procure bail that he might return home. He claimed that the parties who had sued him would be found indebted to him, upon a fair settlement of all their transactions, in the sum of \$22,000. His counsel, believing that, if he was not indebted to the plaintiffs in the actions, any engagements he might enter into, in order to discharge himself from imprisonment, would not be obligatory upon him, gave him that advice, and, with his consent, entered into negotiations with Edward Bloomer to settle the matters in dispute and obtain his discharge.

After different propositions were made, it was agreed that Hill should execute his several promissory notes, amounting to \$4470, payable at different times, to Edward Bloomer, and that the parties should execute mutual releases of all demands. The papers were so executed, and Hill was discharged from prison. The present plaintiff, Holmes, was the attorney acting for the plaintiffs in those actions, and himself received from Hill, in prison, the notes, when executed.

On the trial of this cause, evidence was given for the purpose of showing that Hill, at the time he gave the notes, was not indebted to the parties who had imprisoned him; and on the other side, evidence was given for the purpose of showing that he was largely indebted to them.

The plaintiff asked the court to give the following instructions:

1. Under the pleas of duress in the case, unless the jury believe from the evidence that the legal process under which the defendant was imprisoned, when he made this note, was sued out by the payee and others, the plaintiffs in those suits, without any foundation for the suits, falsely, maliciously, and without probable cause for an action against the defendant, they will find these issues of duress for the plaintiff.

2. If the jury believe from the evidence, that the payee of this note and others, the plaintiffs in the suits in which the defendant was held to bail, at the time when they commenced those suits, had unsettled demands of a lawful character against the defendant therein, to a considerable amount, such demands would constitute a good foundation for those suits, and afford probable cause of action against defendant, notwithstanding the said defendant had also cross-demands by way of set-off against those plaintiffs to a large amount, which he might have established against them upon the trial of the cases.

3. If the jury believe from the evidence, that the payee and others, the plaintiffs in the suits under which the defendant was held to bail, had probable cause of action for those suits, and that they were brought for the recovery of existing lawful demands against the defendant, and that the imprisonment of the defendant, when he gave this note, was under legal process in those suits, and that no other force or constraint was imposed upon him than such imprisonment as aforesaid, they will find these issues of duress for the plaintiff, notwithstanding they may also believe that the defendant would not have given the note sued on, if he had not been in prison under that process.

4. If the jury believe from the evidence that, at the time this note was given, there were mutual unsettled demands existing between the defendant and Edward Bloomer, the payee, (and others connected with him as partners,) and that a balance was claimed against said defendant, to the amount at least of the notes given, and that this note was given on a compromise in settlement of these demands, the consideration was valid and sufficient, however doubtful that claim of the other parties, and without regard to its validity.

5. The jury are instructed that, if they believe from the evidence, that the imprisonment of the defendant was upon probable cause of action and without malice, but in good faith for the recovery of demands which the plaintiffs in those suits believed to be lawfully due them, such imprisonment is not duress

and no defence to this action, notwithstanding the jury may also believe that the defendant would not have given the notes if he had not been held to bail, and notwithstanding the defendant's sole motive in giving them was to get out of jail.

6. The jury are instructed that, if the plaintiffs in those suits had lawful demands against David B. Hill, for about the sums claimed and sworn to, they had a right to sue him for these demands, and to hold him to bail, no matter whether their feelings and motives in doing so, were friendly or hostile towards the defendant, and that such imprisonment cannot, in law, be considered duress, whether the defendant had off-sets or not.

7. If the jury believe from the evidence, that the defendant retained possession of the mills in Wisconsin, after the contract for lumber had been filled, and that he refused to deliver up the mills and the personal property received with them, according to the terms of the contract, he is accountable to the Bloomers for the value of such personal property, and for the value of the lumber made after that time, as valued at the mills, deducting from the value of the lumber only a reasonable rate for expense of cutting the same, (considering the mills, timber, machinery, teams, tools, &c., furnished as proved in this case;) and the Bloomers are not chargeable with any expense however extravagant, which the defendant may have incurred in running those mills after that time.

8. The jury may properly be governed in fixing the value of such lumber cut after the contract was completed, and in fixing the proper rate of cost of cutting, by the prices and rates agreed upon by the parties in their contracts.

9. If the jury believe from the evidence, that the cost of cutting lumber at these mills was more than the lumber was worth when cut, and that the running of the mills was a losing business, the Bloomers were not chargeable with such loss, after the fulfillment of the contract for 1,550,000 feet of lumber.

The court refused all the instructions asked by the plaintiffs, and gave, on its own motion, the following :

1. If the jury find from the evidence, that the defendant gave his note in order to deliver himself from unlawful imprisonment, he is not bound to pay it to any one who received it with knowledge thereof.

2. If the jury find from the evidence, that Edward Bloomer, the payee in said note, sued out the process against the defendant on which he was imprisoned, and that said Bloomer either had no just claim against said defendant, or having just claim against the defendant, wilfully magnified the amount due, in order to prevent the defendant from procuring the amount of bail necessary to his discharge, such imprisonment was unlawful.

1. The law in relation to duress of imprisonment as a defence to an action on a contract, has undergone some change since Chief Justice Bridgman laid it down that imprisonment in custody of law, by the king's writ, will not be duress to avoid a deed, when the arrest is without cause of action; because the party has his remedy by action on the case. 1 Lev. 68. This doctrine was denied to be law by Chief Justice Parsons, in *Watkins v. Baird*, 6 Mass. Rep. 506, and in *Richardson v. Duncan*, 3 N. H. 508. When we determine that such duress as will avoid a contract or conveyance may exist where the imprisonment is under legal process, we are next to ascertain under what circumstances the process must be issued, or what acts must be done under it, to constitute a duress which will be available as a defence. Professor Greenleaf, in his treatise on the law of evidence, (2 Greenl. §302,) says: "that if the imprisonment was lawful, that is, if it were by virtue of legal process, the plea of duress is not supported, unless it appears that the arrest was upon process sued out maliciously and without probable cause; or that, while the party was under lawful arrest, unlawful force, constraint or severity was inflicted upon him, by reason of which the instrument was executed." The party who, maliciously, and without probable cause, sues out a writ against another, and imprisons him upon it, is liable to an action for the tort; but it is not believed that,

to constitute a duress that will avoid a contract which the party may make with his prisoner, the process must be sued out under the same circumstances that would entitle the prisoner to maintain an action for false and malicious imprisonment. It is true, that Chief Justice Parsons, in *Watkins v. Baird*, says: "In our opinion, it is a sound principle of law, when a man shall falsely, maliciously, and without probable cause, sue out a process, in form regular and legal, to arrest and imprison another, and shall obtain a deed from the party thus arrested, to procure his deliverance, such deed may be avoided by duress of imprisonment." But it is to be observed that the learned judge was not giving an opinion upon the law of duress under legal process generally, but in a case in which the party alleging the duress averred that he had been arrested "upon a false, feigned and groundless suit," and that, to obtain his discharge from imprisonment, he had executed the instrument in question. He states the rule to be, that imprisonment, by order of law, is not duress; but, to constitute duress, either the imprisonment or the duress after, must be tortious and unlawful, and he cites 2 Inst. 482, to show that, if a man, supposing he has a cause of action against another, causes him to be arrested and imprisoned, and the defendant *voluntarily* executes a deed for his deliverance, he cannot avoid such deed for duress of imprisonment, although, in fact, the plaintiff had no cause of action. The case of *Watkins v. Baird* was one in which the party obtaining the instrument had caused the party making it to be enticed from New York to Massachusetts, and had there, without any pretence of right, caused him to be arrested and imprisoned until he agreed to the terms proposed to him. The charge given to the jury by the judge who tried the cause, and which was approved by the court in the opinion given, was that, if the evidence was true, gross oppression and injustice had been practiced by the defendant to obtain the release; and that, although the plaintiff, at the time it was obtained, was in prison by virtue of process of law duly executed, yet, that the proceeding was, on the part

of the defendant, such a perversion of justice, that his conduct was not entitled to a more favorable consideration than if there had been no legal process."

Chief Justice Gibson, in *Stouffer v. Latshaw*, 2 Watts, 167, says: "that, to constitute a duress at law, the arrest must have been originally illegal, or have become so by subsequent abuse of it." In *Meek v. Atkinson*, 1 Bail. 87, Judge Johnson, in delivering the opinion of the court, says: "I take it that it is only in those cases where the arrest is without *sufficient cause* or lawful authority, or where an improper use has been made of it, and an advantage gained, that the party can avoid his contract." In *Richardson v. Duncan*, 3 N. H. 510, Chief Justice Richardson says: "But it is now well settled that, when there is an arrest for improper purposes, without a just cause, or where there is an arrest for a just cause, but without lawful authority; or where there is an arrest for a just cause and under lawful authority, for unlawful purposes, it may be construed a duress." This declaration of the law was afterwards approved in *Severance v. Kimball*, 8 N. H. 386. In both the cases in New Hampshire, the duress was by imprisonment under criminal charges, and in the first, the charge appeared to be entirely groundless, and for the purpose of extorting money. It seems to be conceded, in the modern cases, that duress *may* exist where the imprisonment is under legal process, and even where there is a cause of action; and there is no difficulty in imagining cases where the process of law may be employed as an instrument of the grossest oppression, and yet there may be a cause of action. The party sued may really be indebted to the plaintiff, and yet may be charged and held to bail for a sum far beyond his liability, for the very purpose of producing his imprisonment for want of bail. In such case, his arrest is under legal process, and there is a cause of action; but the imprisonment is improper and illegal, and if the plaintiff, by means of such imprisonment, extorts from the defendant a conveyance or obligation, which he was not bound to make, and which is made under the pressure of such imprison-

ment, it may be avoided by duress of imprisonment. But if a plaintiff, in good faith, commences an action to recover what he really believes to be due to him, and without design to employ the process as the means of exacting from the defendant any thing more than he, in good faith, claims to be due; and if the defendant, being imprisoned under the process in such action, voluntarily executes a conveyance or other instrument for his deliverance, he cannot avoid such instrument by duress of imprisonment, although he might have defended himself against the plaintiff's action. *Watkins v. Baird, ubi sup.* So, if there are mutual claims between parties, and one commences his action against the other, claiming no more than in good faith he believes to be due, and the defendant being imprisoned under the process, voluntarily agrees to adjust all claims between them, and such adjustment is made, and obligations given by the defendant while in prison, he cannot avoid them by duress of imprisonment, even by showing that, upon a different and a fair settlement, he would not have been indebted to the plaintiff. The defence of duress does not require that the plaintiff should establish an indebtedness of the defendant equal to the amount of the obligation which the defendant has made. The defendant is to show that the obligation is void because it was obtained from him while imprisoned, and if the imprisonment was by legal process, that the plaintiff in the action designedly used the process to accomplish an improper object. The idea is properly expressed in the latter clause of the second instruction given by the court in the present case, in this language: "If Edward Bloomer, having just claims against the defendant, wilfully magnified the amount, in order to prevent the defendant from procuring the amount of bail necessary to his discharge, such imprisonment was unlawful." Here the imprisonment is declared to be unlawful, if Bloomer knowingly claimed more than he was entitled to recover, for the purpose of putting it out of the power of Hill to procure bail. But the first clause of the same instruction dispenses with all consideration of Bloomer's knowledge or belief in re-

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lation to the justice of his claim, and of the motives by which he may have been influenced. It declares the imprisonment unlawful, so as to bring the case under the rule declared in the first instruction, and avoid the note of Hill, if Bloomer sued out the process against Hill on which he was imprisoned, and Bloomer had no just claim against Hill. This instruction would justify the jury in finding the note void, although Bloomer may have honestly believed himself and his partners entitled to recover every cent for which the actions were brought, and although he had no intention to oppress the defendant, or to gain any advantage by imprisoning him. It enables a defendant, imprisoned under process, to give a note, deed, or other security for the money claimed of him in the action, and then defend himself against his obligation by showing that he had a defence to the action in which he was imprisoned, and that too, without the imputation of any improper motives, or the proof of any improper conduct on the part of the plaintiff in the original action. This position is too broad and did not present the law fairly to the jury. In all the cases in which the parties have been exonerated from their contracts, by reason of duress of imprisonment under process, there has been an improper use made of the process, either in wilfully employing it to imprison the defendant upon a demand that was groundless, or upon a demand knowingly exaggerated, or there has been a subsequent abuse of the process and an advantage gained thereby. In no case, have the motives and purposes of the party suing out the process been thrown out of consideration. In no case, has the action upon an obligation, which was given in prison, been made to turn upon the naked question, whether the party giving such obligation had a defence to the original action.

If, then, the actions of Bloomer and his partners were brought to recover sums of money which they believed, and in good faith claimed to be due from Hill, to the amount claimed, the arrest and imprisonment of Hill was not unlawful, and if Hill made the note sued on, he cannot avoid it by duress of

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imprisonment, on the ground that the original arrest and imprisonment were unlawful. If the actions were brought against Hill, in good faith, to recover amounts believed to be actually due from Hill, and after the arrest there was no practice nor contrivance to extort from him, or to induce him to execute an obligation or note for more than the plaintiffs then believed to be due, there was no such abuse of the process as would avoid the note or obligation, although it may be shown that he could have defended himself against the actions in which he was imprisoned.

The principles here declared will show that the plaintiff was entitled to have the law given to the jury much more favorably to him than it was stated in the instructions given by the court. It has not been thought necessary to notice critically the different instructions asked by the plaintiff and refused by the court.

The judgment is, with the concurrence of the other judges, reversed, and the cause remanded.

LYNCH, Appellant, vs. BOGY, Respondent.

1. A plaintiff cannot recover compensation for merely voluntary services bestowed under no employment from the defendant.

Appeal from St. Louis Law Commissioner's Court.

The court, in this case, gave the following instruction for the plaintiff :

"If the jury believe from the evidence, that the plaintiff, as the agent, or at the request of defendant, sold the ground described in plaintiff's petition, and that the defendant received the proceeds of said sale, they will find for the plaintiff a reasonable compensation for such services."

The following were given for the defendant :

"Unless the jury believe from the evidence that plaintiff,

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Gerge W. Lynch, was employed by the defendant to sell the real estate mentioned in the petition, he cannot recover."

"The jury are instructed that the plaintiff cannot recover for merely voluntary or gratuitous services rendered the defendant, although such services may have been a benefit to defendant."

McMartin, for appellant.

B. A. Hill, for respondent.

GAMBLE, Judge. The plaintiff, in this action, claimed compensation for services rendered to Bogy, the defendant, as his agent, in effecting the sale of certain real estate belonging to the defendant. The answer denied that the plaintiff had ever been employed or requested by the defendant to make any sale of his real estate, or to act as his agent.

After the evidence was closed, the court gave one instruction at the request of the plaintiff, and two at the request of the defendant, which, together, presented to the jury, with fairness, the law applicable to the question they were to try. The instructions which were asked by the plaintiff, and refused by the court, were properly refused. The judgment is, with the concurrence of the other judges, affirmed.

THE STATE, Plaintiff in Error, vs. GRIMSLEY, Defendant in Error.

1. In a declaration upon a collector's bond, the breach assigned was, that the defendant collected a specified amount which he failed to pay over. The plea was, that defendant collected the amount named in the breach, and paid the same over, and that this was all the money collected by him. The replication denied that this was all the money collected by the defendant. *Held*, the replication was bad for departure, and as tendering an immaterial issue.
2. A count in a declaration upon a collector's bond which fails to show that the money which he failed to pay over was collected during his *term of office* is bad.

Error to St. Louis Court of Common Pleas.

T. Polk, for plaintiff in error.

E. & B. Bates, for defendant in error.

RYLAND, Judge, delivered the opinion of the court.

At the November term, 1843, of the St. Louis Circuit Court, the State commenced suit against Jacob R. Stine, Thornton Grimsley and Benjamin W. Ayers, by filing her declaration in debt on the collector's bond of said Stine, Grimsley and Ayers, the two last being his (Stine's) securities. The declaration contains three counts. In the first count, the plaintiff complains of the defendants of a plea that they render unto the said plaintiff the sum of seventy-five thousand dollars, which they owe to and unjustly detain from plaintiff. This count avers that the county court of St. Louis county, on the 20th day of March, 1839, appointed said Jacob R. Stine collector of the revenue for the county of St. Louis, in the state of Missouri, for the year 1839; that, on said 20th day of March, 1839, the said Jacob R. Stine, as principal, Thornton Grimsley, Hugh O'Neil, (since deceased) and Benjamin W. Ayers, as his sureties, executed their certain writing obligatory, by which they acknowledged themselves to be indebted to the plaintiff in the sum of \$35,000, conditioned that said Jacob R. Stine should truly and faithfully discharge the duties of his office, as collector, according to law, and duly collect and pay over the moneys assessed upon said county, then the obligation to be void. The plaintiff then assigns the breaches, that the said Stine entered upon and undertook to discharge the duties of said office of collector of the revenue for the county of St. Louis, in the state of Missouri, but did not truly and faithfully discharge the duties of his said office of collector according to law; nor did he duly pay over all the moneys assessed upon said county by him collected, but on the contrary, during his said term of office, and while he was acting as such, to-wit, on the third day

State v. Grimsley.

of December, 1839, the said Jacob R. Stine had collected a large sum of money, to-wit, the sum of nineteen thousand four hundred and seventy-eight dollars and four cents, which, although often requested, he refused to pay, or any part thereof, by means whereof, an action hath accrued to the plaintiff to have and demand the sum of \$25,000, part of the above sum of \$75,000.

The second count is similar to the first, except that the plaintiff makes the year, the term of office, begin from the date of the bond, that is, the 20th of March, 1839, and avers that on the 19th of March, 1840, he collected \$26,903 79; the money remains in his hands unpaid; he refused to pay it over or any person for him. The bond is for \$25,000.

The third count avers that the bond was executed on the 20th March, 1839; that Stine was appointed collector for 1839, to begin on the 20th March, and that on the 1st of July, 1840, he collected \$28,441 35, which remains in his hands, and which he failed to pay over. The bond was for \$25,000.

The defendants craved oyer of the bonds mentioned in said counts, and it is given, and the bond in each count is the same bond, there being but one bond, which said bond is as follows :

“ Know all men by these presents, that I, Jacob R. Stine, as principal, and we, Thornton Grimsley, Hugh O’Neil and Benjamin W. Ayers, as securities, acknowledge ourselves to be indebted to the state of Missouri in the just and full sum of \$25,000, good and lawful money of the United States, for which sum, well and truly to be paid, we bind ourselves, our heirs, executors and our administrators jointly, severally, firmly by these presents; sealed with our seals and dated at the county of St. Louis, in the state aforesaid, this twentieth day of March, in the year of our Lord 1839. The condition of the above obligation is such, that whereas, the said Jacob R. Stine has been appointed collector of the revenue for the county of St. Louis, in the state of Missouri, for the year 1839, by the county court of said county of St. Louis: Now, if the said Jacob R. Stine shall truly and faithfully discharge the duties

Error to St. Louis Court of Common Pleas.

T. Polk, for plaintiff in error.

E. & B. Bates, for defendant in error.

RYLAND, Judge, delivered the opinion of the court.

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of December, 1839, the said Jacob R. Stine had collected a large sum of money, to-wit, the sum of nineteen thousand four hundred and seventy-eight dollars and four cents, which, although often requested, he refused to pay, or any part thereof, by means whereof, an action hath accrued to the plaintiff to have and demand the sum of \$25,000, part of the above sum of \$75,000.

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of his office as collector, according to law, and duly collect and pay over all moneys assessed upon said county, then this obligation to be void, else to remain in full force and virtue.

“JACOB R. STINE, (seal.)

“THORNTON GRIMSLEY, (seal.)

“HUGH O’NEIL, (seal.)

“B. W. AYERS. (seal.)

“Approved of in open court, this 20th day of March, 1839.

“JOSEPH LEBLOND, J. C. C.

“H. WALTON, J. C. C.

“M. P. LEDUC, J. C. C.”

The defendants then filed seven pleas to the plaintiff’s declaration.

The first plea is to the whole declaration, and alleges that Stine was appointed collector of the revenue of St. Louis county, in the state of Missouri, by the county court, on the 19th of March, 1839, for the year 1839, and that, on the 20th of March, the day of the appointment, he executed the bond in the several counts in the declaration mentioned, which is set out above, as and for his official bond, and the other defendants, as his securities; that immediately thereafter he entered upon his duties, and continued in the discharge of his duties during the whole of the year 1839, and during all that time, he, as said collector, did truly and faithfully discharge all the duties of his said office of collector, according to law, and this, &c.

To this plea, the plaintiff filed her demurrer, and the court sustained the demurrer.

The second plea is to the first count of the declaration, and alleges that Stine received the sum stated in the breach, \$19,478 04, and paid the same into the state treasury on the 3d of December, 1839, which was all the money collected by him during the continuance of his office. To this plea plaintiff filed two replications. The first replication avers that \$19,478 04 was not all the money collected by Stine during his continuance in office; the second replication avers that he did not pay into the state treasury the said sum of \$19,478 04.

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On this last replication, there was issue taken by the defendants, which, on trial, was found for the defendants. The defendants filed their demurrer to the first replication, which was sustained.

The defendants' third plea is to the second count of the plaintiff's declaration, and alleges that Stine did pay over all the money assessed and collected for the revenue of St. Louis county for the year 1839, amounting to the sum of \$26,703 79. To this plea the plaintiff demurred, and the court sustained the demurrer.

The defendants' fourth plea is to the second count, and avers that Stine was not at any time appointed collector for the year commencing the 20th of March, 1839. The plaintiff demurred to this plea; the demurrer was overruled; a *similiter* was added. This issue was found for the defendants.

The defendants' fifth plea is to the third count of the plaintiff's declaration, and avers that the defendant, Stine, did pay over all moneys assessed and collected for the county of St. Louis, amounting to \$28,441 35. To this plea the plaintiff filed a demurrer, which was sustained by the court.

The defendants' sixth plea is to the third count, and avers that Stine was not appointed collector for the year commencing on the 20th day of March, 1839. To this there was a demurrer by plaintiff, which being overruled, issue was joined, and this issue was found for the defendants.

The seventh plea is to the whole declaration, and avers that, although Stine was collector, and collected money assessed upon the county of St. Louis, amounting to \$21,087 30, that he paid over the same to the state treasury, and did pay over all the money collected and payable to the plaintiff, being \$21,087 30. To this plea the plaintiff demurred, which demurrer was overruled. The plaintiff then filed two replications to this plea: 1st, that Stine did not pay over all moneys collected and payable to the plaintiff. On this replication issue was joined, and this issue was found for the defendants. The second replication avers that \$21,087 30 was not all the money

collected and payable by Stine to the plaintiff. To this last replication the defendants demurred, and the court sustained the demurrer.

The deaths of Stine and of Ayers were suggested, and the suits abated as to them. The venue was changed, by order of the Circuit Court, to the Court of Common Pleas, the judge of said Circuit Court being interested in the matter in controversy. The issues were found for the defendants by the court without a jury. The plaintiff brings the case here by writ of error.

1. The only points then, requiring the consideration of this court, rest upon the pleadings. The Court of Common Pleas decided for the plaintiffs upon all the demurrers, except two. The first one of these is the demurrer to the plaintiff's first replication to the defendants' second plea, being the plea to the first count of the declaration, and the other is the demurrer to the plaintiff's second replication to defendants' seventh plea. The two replications of the plaintiff and the demurrers thereto, and the action of the court in sustaining these demurrers, are the only points presented by plaintiff in error upon which a reversal is asked, there being no bill of exceptions, no evidence preserved, and no instructions asked. These replications, then, present the only matter for our consideration.

The plaintiff assigns the breach in the first count, by alleging that the defendant, Stine, collected of the revenue, the sum of \$19,478 04, which, on the 3d of December, 1839, was in his hands, and which he failed and refused to pay over to the plaintiff. The second plea alleges that Stine did receive the sum stated in the breach, \$19,478 04, and paid the same into the state treasury on the 3d of December, 1839, which was all the money collected by said Stine during the continuance of his office. The first replication, which was demurred to, simply denies that the sum of \$19,478 04 was all the money collected by Stine during his continuance in office. The second replication denied his paying into the treasury the said sum of \$19,478 04. Now the sum mentioned in this plea is the same

as the one mentioned in the breach, and the replication of the plaintiff is a departure in pleading, and is, therefore, bad. Again, it is not sufficient to aver that the sum alleged in the plea, which was averred to be the whole amount collected by the defendant and paid over to the plaintiff, was "not the whole amount," or "was not all," and there stop. The plaintiff should have gone further, and stated what the whole amount was. The replication was a departure, and it also tendered an immaterial issue. If the plaintiff had filled up his replication by averring, after stating that the sum in the plea "was not all," what the amount really was, it would then have appeared most manifest, had the amount differed from the amount claimed in the breach of the first count, that there was a departure. To avoid this, the plaintiff stopped short, and rendered his replication fatally defective. Departure, in pleading, is when a man quits or departs from his case, which he has first made, and has recourse to another, or when the replication or rejoinder contains matter not pursuant to the declaration or plea, and which does not support and fortify it. The first count here goes for a certain sum, which the defendant, Stine, was charged with having collected, and with having failed and refused to pay over to the plaintiff. The defendant admits that he collected that sum, which was all that he collected during his continuance in office, and that he paid it over. The plaintiff says "it was not all." Why then did the plaintiff allege such a breach? The replication is fatally defective, and the plea is good, and being found on issue for the defendant, is a bar to the first count.

The same may be said of the replication to the seventh plea. This plea is to the whole declaration; it avers that, although Stine was collector, and collected money assessed upon the county amounting to \$21,087 30, he paid over that sum into the state treasury, and did pay over all the money collected and payable to the plaintiff, being the sum of \$21,087 30.

The plaintiff replied by two replications: 1st, that Stine did not pay over all the moneys collected and payable to the plain-

tiff. Upon this, issue was joined and found for the defendant. This is a bar to the action. The second replication avers, that \$21,087 30 was not all the money collected and payable by said Stine. This replication is not sufficient; it obviously tenders an immaterial issue: if the defendant collected and paid over all the money payable to the plaintiff, that fact is a complete bar to the action, and the second replication was wholly useless; it, at all events, tendered an issue immaterial.

2. In our view of this case, the third count of the declaration is bad. The collector was appointed for the year 1839. Now suppose, for argument's sake, he was appointed from the 20th of March, 1839, to the 20th March, 1840. This declaration—this suit was pending against the securities; indeed, it finally became narrowed down to one defendant, and he, alone, security. This court held, in the case of *Moss et al. v. The State of Missouri*, 10 Mo. Rep. 338, that the securities of an officer appointed for a limited time, are only liable for his official acts during the term for which he was appointed. Now this third count charges that he had collected money, and that he had remaining in his hands \$28,441 35, and that he failed to pay over the same on the 1st July, 1840. Now it does not appear but that he had collected, after the 20th of March, 1840. The count is not good, and the demurrer, cutting back beyond the second replication to the seventh plea of the defendant, reaches this count and cuts it off.

Upon the whole record, then, as presented to this court, the plaintiff has, by her manner of pleading, no grounds of complaint. The main issues of fact have been found against her, without any complaint on her part. These replications present matters of little or no weight in the case, and the judgment of the Court of Common Pleas is, with the concurrence of Judge Scott, affirmed. Judge Gamble, having been of counsel in the court below, did not sit in the cause.

BENOIST *et al.*, Respondents, *vs.* THE CITY OF ST. LOUIS,
Appellant.

1. Under the charter of the city of St. Louis, of 1841, there may be different taxes or rates of taxes in the same year, provided the aggregate does not exceed the limit fixed by the charter.
2. Under that charter, the city council might levy taxes either for the fiscal year or the calendar year, in its discretion.

Appeal from St. Louis Circuit Court.

Petition filed by the respondents to enjoin the appellant from selling land for taxes alleged to be illegal.

The cause was submitted to the court upon an agreed statement of facts. The facts agreed upon were substantially as follows: "That the property upon which the taxes were levied was first brought within the limits of the city by the charter of 1841; that the conditions of the 17th section of article 7, of the charter of 1841, were not complied with until the 25th day of October, 1850; that, for the year 1850, real estate within the "old limits" was taxed at the rate of one per centum for city purposes, besides the special taxes authorized by acts of the general assembly and the city ordinances; that, by the 14th section of article 7, of the charter of 1843, it is declared that the fiscal year of the city shall terminate on the day preceding the second Monday of April in each year, and the disbursements, expenditures and appropriations of the city are made and conducted in reference to the fiscal year established by the charter; that, in the month of November, 1850, an ordinance was passed by the city, levying a tax for the year 1850, of a half of one per cent. on all property within the new limits, and including the land of the plaintiffs; and that such tax is equal to a tax at the rate of the sixteenth of one per cent. per annum, from the second Monday of April to the 25th of October, 1850, and a tax at the rate of one per cent. per annum from the 25th of October to the day preceding the second Monday of April following."

Upon these facts, two questions were presented for consideration, which are stated in the opinion of the court. The Circuit Court decided that the city could collect more than one sixteenth of one per cent. for city purposes for the year 1850, but that taxes could only be levied and collected by the city according to the calendar year. The injunction was rendered perpetual as to a portion of the taxes claimed, and the city appealed to this court.

Geyer & Dayton and *J. C. Richardson*, for appellant.

I. The Circuit Court erred in deciding that taxes must be levied and collected according to the calendar and not to the fiscal year. In the absence of any express directions upon the subject in the charter, some discretion may fairly be considered as given to the city government, in fixing what particular period shall compose each year. As the disbursements and appropriations of the city are made and conducted in reference to the fiscal year, there is a fitness and convenience, without any conflict with existing laws, in levying and collecting taxes in reference to that year, instead of the calendar year. A reference to some provisions of the charter strengthens the conclusion that the fiscal year is the one intended. Sec. 14, art. 7. Sec. 1, art. 7. Sec. 1, art. 3. Sec. 20, art. 7. Sec. 22, art. 7. Art. 4. Art. 2. Art. 5. II. The power to tax property in the new limits, at the same rate as in the old, attached, for the future, the moment the condition of sec. 17, art. 7 of charter of 1841 was performed; and this performance having been completed on the 25th of October, 1850, in the midst of a fiscal year, the city had the right to impose taxes, for the residue of such year, at the same rate per year at which taxes had been imposed on property in the old limits that same year. The charter does not prescribe the time of the year at which taxes for the year shall be levied or collected. Without conflict with the charter, the city might levy and collect all its taxes for the year, within the last month of the year, or might divide the year into quarters, and collect one fourth of the annual tax each quarter.

Haight & Shepley, for respondents. I. The system of city taxation is based upon, and the annual tax is for the calendar year. This is obvious from the provisions of the charter. The first subdivision of the second section of article 3, provides that the mayor and common council shall have the power "to levy and collect taxes not exceeding one per centum," &c. This means an annual tax. Whenever the word "year" is used in statutes or ordinances, it will be held to mean the calendar year, unless there is something in the context that shows otherwise. Again, the ordinances of the city for the assessment and collection of the taxes on property within the city limits, all look to the idea that a calendar year is intended. (Rev. Ord. 1850, p. 126, secs. 1, 3, 5 and 6.) It is provided that the assessors shall, *on the first Monday of February*, proceed to assess the property within the city subject to taxation. If the tax is to be levied for the year commencing the second Monday of April, here is a provision for assessing the value of the property, at a time altogether outside of the year for which the tax is laid. This would be in conflict with the power granted by the charter, (art. 2, sec. 5,) as well as ordinance 2486, both of which proceed upon the basis that the assessment is to be made upon the value of the property within the year in which the tax is levied, be it fiscal or be it calendar. The "fiscal year" was first established by the charter of 1843, merely for the convenience of the city in keeping and balancing her accounts at the close of the different administrations. It makes no difference in keeping these accounts, whether taxes are levied for the year commencing January 1st, or the year commencing the second Monday of April. The state and county taxes are levied and assessed according to the calendar year, yet there is, in the statute regulating that matter, no express provision on the subject. The city legislation seems to be taken from the state legislation on the same subject. II. Whether the year for which taxes were to be levied was the fiscal or the calendar year, the injunction was properly granted, for the reason that the city had no power to

levy for that year any larger tax than the one-sixteenth of one per cent., with the exception of the special taxes. The ordinance No. 2520 fixes the taxation upon property in the new limits, at one-half of one per cent. for the whole of the fiscal year ending the day prior to the second Monday of April, 1851, when, confessedly, they had no power to levy more than one-sixteenth of one per cent. up to the 25th of October, 1850, beside the special taxes. If they could levy for any part of that year a tax of more than one-sixteenth of one per cent., they might possibly have done it by levying, in so many words, a tax at the rate of one-sixteenth of one per cent. up to October 25, 1850, and at the rate of one-half of one per cent. for the remainder of the taxable year; but they have not done this. For the whole year, they have levied one uniform tax upon property in the new limits, altogether above that which they had a right to impose, for part of the year at least. Nor does it help the matter out, because, by calculation, we may discover that the tax which they have levied does not exceed one-sixteenth of one per cent. up to October 25, and one per cent. for the remainder of the year.

GAMBLE, Judge, delivered the opinion of the court.

1. The parties in this case agreed upon and signed a written statement of facts, and at the end of it, stated the questions of law which they desired the court to consider and decide. These questions are thus stated: "the only questions presented for the consideration of the court on the above facts are, 1. Whether the city could demand or collect more than one-sixteenth of one per cent. for any part of the year 1850; 2. Whether, in this case, the city is required to levy and collect taxes according to the calendar year, or a year beginning on the second Monday of April and ending on the day preceding the second Monday of April following." It will be seen that both these are questions of power, and do not involve the consideration of whether the measures adopted by the city author-

ities were proper or expedient measures in the execution of the power, if such power existed.

On the first question, it is necessary briefly to state the provisions of the charter under which this property was subjected to taxation. By the charter of 1841, the limits of the city were greatly extended, and embraced a large scope of country which had never been laid out in lots. This property, being brought within the city, was subjected to the power of the corporation, and would have become liable to the burdens to which all other property in the city, was subject, but for a limitation on the taxing power of the city government. It was provided in the charter, that the city should extend the paving of certain streets and avenues through the territory thus brought within the city to the new boundaries of the city, and that, until such improvements were made, the city should not have power to impose a tax for city purposes upon the property brought by the act within the city, exceeding the one-sixteenth of one per cent. The improvements thus required to be made were not completed until the 25th day of October, 1850, although the city claimed that they had been substantially completed some years before. The question in relation to their completion was determined in this court in the case of *Allen v. The City*, 13 Mo. Rep. 400. At the time of that decision, there was in force an ordinance passed 29th March, 1850, which imposed a tax of three-fourths of one per cent. upon all property within the city made taxable by law, for state purposes, unless a different rate should be fixed by ordinance. When it was decided that the improvements had not been made, as required by the charter, so as to admit of a greater tax being imposed than one-sixteenth of one per cent. upon the property within what was called the "new limits," an ordinance was passed fixing the rate of taxation upon all property within the "old limits" at one per cent. for the year 1850, and leaving the property in the new limits without any rate of taxation, except for the special taxes authorized by acts of the general assembly. This ordinance was passed July

26, 1850. The city government, with all diligence, applied itself to the completion of the improvements required by the charter, and by the 25th of October of that year, the requirements in the charter were all fulfilled, and the property within the new limits became subject to the same rate of taxation as property within the old limits. An ordinance was passed November 2, 1850, imposing a tax of one-half of one per cent. upon all property within the new limits made taxable for state purposes, for the fiscal year ending the day prior to the second Monday in April, 1851. It is admitted by the parties, that the tax of one-half of one per cent. thus levied, is equal to one-sixteenth of one per cent. as an annual tax, calculated from the second Monday of April to the 25th of October, 1850, and a tax of one per cent. from the 25th of October, 1850, to the second Monday of April, 1851. The question is presented upon these facts, whether the city could impose any tax beyond the one-sixteenth of one per cent., for any part of the year 1850, as the conditions upon which a larger tax was permitted by the charter, were not performed until October of that year.

The charter of 1841, which extended the limits of the city so as to embrace the property of the plaintiffs, conferred upon the city council the power to levy and collect taxes not exceeding a certain rate per cent., in language that would have authorized the same rate of taxation upon the property then brought within the city limits that was imposed upon the property within the former limits. The section, then, which requires the paving of certain streets, and, until that is done, prohibits the levy of any tax beyond the one-sixteenth of one per cent. is a limitation upon the general power conferred by the former clause. That restriction is upon the rate of taxation until a certain event, and when then that event occurs, the restriction ceases and the power is at large. When, then, the restriction no longer exists, the question arises, whether there is any requisition in the charter that taxes shall be imposed for an entire year, so that there cannot be several different taxes or rates

of taxes upon the same property in the same year, although the whole amount levied does not exceed the limit of one per cent. fixed by the charter. It is not pretended that, in the charter, there is any express provision directing how the general power to levy taxes shall be exercised. It is admitted, that the only limit in amount is the one per cent. stated in the charter. To give to this restriction its proper force, it is necessary to understand it as one per cent. for a year; for if several taxes, of one per cent. each, might be levied upon the same property in one year, the restriction would be entirely nugatory. The limit of the right to tax is one per cent. per annum. The power is, "to levy and collect taxes not exceeding one per cent. upon all property made taxable by law for state purposes." Within the limit thus prescribed, the power may be exercised according to the discretion of the city council. The power can only be exceeded by levying a tax on property not taxable for state purposes, or levying a greater amount of tax in any one year than one per cent. A tax may be levied for a specific portion of a year, and, indeed, I see no reason to doubt that, as the city council sits several times in a year, it may not levy several distinct taxes on the same property during the same year, provided the aggregate does not exceed one per cent. The question, whether any greater rate of taxation than one-sixteenth of one per cent. could be levied for any part of the year 1850, is decided by determining 1st, that when the restriction to that rate ceased by the completion of the improvements, whether in the beginning or middle of the year, the power, under the general grant, might be exercised in any mode within the discretion of the council, and, 2d, that the power may be exercised for a portion of a year.

The Circuit Court, by its decree, decided that question for the city, as it maintained that the tax levied was correctly imposed at a rate which was equal to one-sixteenth of one per cent. from the second Monday of April to the 25th of October, and one per cent. from the last named day to the 1st of January, 1851.

2. But the decision maintained that the tax must be levied according to the calendar year, and that, therefore, the attempt to extend the tax to the second Monday of April, 1851, was illegal. This, then, presents the second question which the parties, in their agreed case, desire the court to consider, that is, whether the council can levy a tax for a year, commencing in April, in one year, and ending in April of the next year.

It is not pretended that the charter, in any of its provisions, establishes the beginning and end of the year for which taxes are to be imposed; and, indeed, it is only by inference from the limitation upon the power to levy taxes, that we ascertain that taxes are to be levied with any reference to the year.

The period of a year is several times mentioned in the charter, and reference will be made to some of the instances in which it is spoken of. "The board of delegates shall be composed of two members for each ward, to be chosen by the qualified voters of the several wards, *for one year.*" "The board of aldermen shall consist of two members for each ward, chosen by the qualified voters, *for two years.*" "The seats of those of the first class shall be vacated at the expiration of the *first year*; and of the second class, at the expiration of the second year; so that one half may be chosen every year." "A general election for all the officers of the corporation required to be elected by this act, or any ordinance of the city, shall be holden on the first Monday of April in each year." "The *fiscal year* of the city shall terminate on the day preceding the second Monday in April *in each year.*" "The appropriations of the city council, for the payment of interest, for improvements, and for city expenses during any *one fiscal year*, shall not exceed the amount of the income of the preceding *fiscal year.*" "The city council shall cause to be published, within one month after the end of each fiscal year, a full, complete and detailed statement of all moneys received and expended by the corporation during the preceding fiscal

year." These are sufficient extracts from the charter to show the periods referred to as years. The delegates and aldermen are elected—the delegates for one and the aldermen for two years. The period has no reference to the calendar year, but extends from the April of one year to the April in the next year, when a new city council is to be brought into being—the aldermen continuing to hold for two such years. The clause fixing the fiscal year declares that it shall terminate on the day preceding the second Monday of April *in each year*, that is, in each calendar year. The other provisions in relation to the fiscal year show the intention that the accounts of the revenue of each year shall be brought up to the close of each administration, although, as is said, the accounts *might be* so kept as to show the revenue of each fiscal year, notwithstanding it embraces parts of two calendar years, even if the taxes were imposed with reference to the calendar year.

In the absence, then, of any provision in the charter, fixing the calendar year as that for which taxes are to be levied, the city council would have the discretion to fix the time at which the period of a year is to commence, always subject to the limitation that the taxes of the year so fixed, shall not exceed the limit prescribed in the charter; and if we had anything to say about the propriety of fixing the year, as the calendar or fiscal year, we would say that it was most proper to adopt the fiscal year. When the whole rate of tax allowed by the charter has been levied for a year, either fiscal or calendar, and a change is made to the other period, it is necessary to see that the tax subsequently levied for the altered period does not include any of the time for which the first tax was levied, as that would be to exceed the limit fixed by the charter on the power to tax. In the present case, if the previous taxes levied upon this property were levied according to the fiscal year, then the plaintiffs are only required by the ordinance to pay taxes for a year from the end of the period for which they had before paid them. But if the property had before been taxed according to the calendar year, then, according to their

views, they were subject to pay taxes for the whole of the year 1850, from the first of January to the first of January, 1851; whereas, the ordinance in question omits to tax the property altogether, from the 1st of January to the second Monday of April, 1850, and makes the year end on the second Monday of April, 1851. Nothing appears in the case to show that, in relation to the property in the new limits, the taxes do not continue to be levied according to the fiscal year, and so the property there continues to be taxed by the year, although a period different from the calendar year.

The ordinances of the city, referred to in the argument, may show the system previously adopted for the levying and collecting taxes in the city, but do not furnish any light upon the question of power, which is the subject of consideration. Inconvenience may be produced to the accounting officers of the city, by having taxes imposed upon property in different parts of the city for different periods, but such inconvenience does not affect the power to adopt that as the mode of levying taxes, nor authorize a citizen to complain of the burden imposed, when he pays no more than his fellow citizens, and no more than the rate allowed to be imposed by law.

The Circuit Court then, in my judgment, erred in restraining the city from the collection of so much of the tax imposed upon the plaintiffs as was considered to be for that portion of the year 1851, between the 1st day of January and the day preceding the second Monday in April.

It has been argued that the tax attempted to be imposed is illegal, as it imposes a rate of one-half of one per cent. for the whole year ending on the day preceding the second Monday of April, because, until the completion of the improvements on the 25th of October, the charter expressly prohibited any greater rate than one-sixteenth of one per cent. It is admitted in the case agreed, that the rate adopted is precisely equal to one-sixteenth of one per cent. from the beginning of the fiscal year to the 25th of October, and one per cent. from that date to the termination of that year. We are dealing with

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a case in which the question is, whether there has been an attempt to collect from the plaintiffs an amount of tax beyond that which might lawfully be imposed, and the parties expressly admit that the tax imposed does not exceed in amount the sum which, according to this opinion, might be legally imposed. The case then is one in which the courts are called upon to interfere, when it is mathematically certain that the plaintiffs are not injured, and when the tax imposed by the ordinance would be certainly legal, if imposed with a few additional words in the ordinance. I think this is not a case for an injunction, and that the judgment of the Circuit Court ought to be reversed, the injunction dissolved, and judgment rendered for the defendants.

RYLAND, Judge. I concur.

SCOTT, J., dissenting. This case depends on the construction of the charter of 1841, which exempted the lots and grounds beyond the (then) present limits of the city from any tax exceeding one-sixteenth of one per cent. before certain improvements therein mentioned were completed. The meaning of the act is, that the new limits shall not be taxed more than one-sixteenth of one per cent. per annum. Was the year contemplated the fiscal year, or the calendar year? There is nothing in the law itself, which furnishes a means for the solution of this question, and we are thrown upon the city ordinances, in order to ascertain what was intended. There is nothing in the reason of the thing, which makes the year for which taxes are to be laid and collected correspondent with the fiscal year. The fiscal year of the state does not correspond with the year for which taxes are assessed and collected. The fiscal year of the city begins the day before the second Monday in April. The ordinances of the city require the assessment of the revenue to be commenced in February, thus showing that the year for taxation is different from the fiscal year. As the assessment must commence on the first of February, of the fiscal

year, in the year within which taxes are to be laid and collected, it would be singular that the assessment should begin in February, when it is not to be completed until May. This would make the assessment run into two fiscal years, so that the taxes would be assessed partly in one fiscal year and partly in another ; whereas, it would seem that the reason of the thing is, that the assessment and collection should both be for the same year ; and that can only be done consistently with the ordinances, by holding that the year contemplated is a calendar year. The extending the tax from one calendar year, so as to make it cover part of another year, was an evasion of the restriction imposed upon the power of taxing the new limits, and was, therefore, unauthorized.

The judgment, in my opinion, ought to be affirmed.

POWERS, Respondent, *vs.* NELSON, Appellant.

1. It is no objection to a recovery on a note, that it was endorsed to the plaintiff after it was due and without consideration, no defence being shown.

Appeal from St. Louis Circuit Court.

M. L. Gray, for appellant.

A. P. & P. B. Garesché, for respondent.

GAMBLE, Judge, delivered the opinion of the court.

The note upon which this action is founded, is dated 9th of February, 1842, made by Nelson, payable to one Richard Dempsey, and endorsed to the plaintiff. The defendant, by his answer, admitted the making of the note, denied that the endorsement was for a valuable consideration, and alleges that it was made long after the note became due. The answer also alleges that the defendant made a settlement with Dempsey in

February, 1845, in which this note was included and satisfied. Upon the trial, the plaintiff, having proved the handwriting of the endorser, and filled up the endorsement, gave the note in evidence. The defendant gave no evidence for the purpose of showing that the note had been paid to Dempsey. The plaintiff himself testified that he had purchased the note from Dempsey, or rather that he had taken it on account of indebtedness from Dempsey. During the trial, the defendant asked leave to amend his answer, by stating a set-off against Dempsey, which accrued while he was the holder of the note, which the court refused to allow.

1. The instructions asked by the defendant, after the evidence was closed, were all properly refused. There was no evidence given to prove that the note had been satisfied while it was held by Dempsey. The case, at the close of the evidence, stood as a case of a negotiable promissory note, endorsed after it was due, the endorsement being in blank at the trial, and then filled up to the plaintiff; some evidence being given that a petition had been drawn upon the note in the name of David Powers, a brother of the plaintiff, the witness who gave the testimony saying, at the time of testifying, that he supposed the name of David Powers was used as plaintiff by mistake. There was then no defence against the note, whether Dempsey had endorsed the note before or after its maturity, or for a good consideration or no consideration whatever, and the court gave proper instructions on the case.

The court properly refused leave to amend the answer. If the defence sought to be introduced would have availed the defendant, he had, after his first answer, in which he swore that the note was endorsed after it was due, twice obtained leave to file a supplemental answer, and had not availed himself of the leave given. The judgment is, with the concurrence of the other judges, affirmed.

Reeves v. Larkin.

REEVES, Respondent, vs. LARKIN *et al.*, Appellants.

1. A party may recover for damages caused by the negligence of another in performing a duty, unless his own negligence contributed to the loss.
2. A variance between the petition and the evidence, as to the manner in which the negligence of the defendant operated to occasion the loss sued for, is not material under the new practice.

Appeal from St. Louis Court of Common Pleas.

Action to recover the value of a mule alleged to have died from injuries received in hauling a loaded dray across a sewer constructed by the defendants, and negligently covered. The facts sufficiently appear in the opinion of the court.

J. A. Kasson, for appellant.

H. N. Hart, for respondent.

GAMBLE, Judge, delivered the opinion of the court.

1. The instructions given by the court, on its own motion, require that the jury, before finding for the plaintiff, shall be satisfied that the defendants so negligently and improperly filled up the sewer made by them across the levee, that by reason thereof the plaintiff's mule was injured, and that the plaintiff was not guilty of any negligence or carelessness in the management of his dray and mule, at the time of the injury. In the instructions given by the court, on its own motion, as well as in the instructions given at the request of the defendants, the rule is placed prominently before the jury that the plaintiff is not entitled to recover, if he could have passed the sewer or drain in safety, at the time of the accident, by the exercise of reasonable care and attention in passing it. These instructions seem to place the law of the case as favorably before the jury as the defendants could ask it. They had, for their own convenience and advantage, placed a sewer from the cellar of their building across a public thoroughfare in the city, and having accomplished their object by draining their cellar, they

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filled up the sewer with stone. They had made the surface even with that of the street, but as it was less compact than the street, it necessarily sunk below the surface of the street, and occasioned difficulty to those passing it with loaded vehicles. If the plaintiff's mule was lost to him by reason of the negligent and careless manner in which this sewer was filled up by the defendants, he is entitled to recover, unless his own negligence has contributed to the loss, and this rule is stated with sufficient clearness by the court.

2. The objection taken, that the case made by evidence and covered by instructions is not that stated in the petition, is not in this case tenable. The petition, it is true, states that, while the plaintiff's dray was passing the sewer, "the sewer gave way" and the loss of the mule was occasioned thereby. The case in evidence showed that the depression in the street occasioned by the defendants' sewer, had existed for some time, and that there was no sudden alteration in it at the time of the injury. Still, the action, in its scope, is to recover damages which the plaintiff alleges he sustained by reason of the negligent and careless manner in which the defendants filled up the sewer, and although he may have incorrectly stated the mode in which the negligence of the defendants operated to produce the result, he has sufficiently alleged the carelessness of the defendants in the performance of a duty, and the loss of the plaintiff occasioned thereby. Under our system of practice, there is no such variance as required an instruction which would have occasioned a nonsuit. The judgment is, with the concurrence of the other judges, affirmed.

THORNTON, Respondent, vs. RANKIN, Appellant.

1. A note was payable to the order of "I. J. C., guardian," &c. Held, an endorsement by I. J. C. passed the title to a party who received for value and in good faith: the words "guardian," &c., being mere words of description.

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Appeal from St. Louis Court of Common Pleas.

George Engelmann, on the 1st of December, 1851, became the purchaser of certain real estate belonging to Priscilla and Jacob Cooper, minors, at a sale by Isaac J. Cooper, their guardian, made by order of the Probate Court. For the deferred payments, he executed his negotiable notes payable to the order of "Isaac J. Cooper, guardian," &c. Before these notes became due, they were by Isaac J. Cooper endorsed and delivered to John Thornton for a valuable consideration. Thornton had no notice of the facts connected with the making of the notes, or of the trust wherewith Isaac J. Cooper was clothed in respect thereof, other than was to be gathered from their face. Afterwards, Isaac J. Cooper was removed from the office of guardian, and John H. Rankin was appointed to succeed him. Engelmann being forbidden by Rankin to pay the notes to Thornton, filed this petition in the nature of a bill of interpleader. Upon facts found as above stated, the court below ordered the money to be paid to Thornton, and Rankin appealed to this court.

T. T. Gantt, for appellant.

T. Polk, for respondent.

RYLAND, Judge, delivered the opinion of the court.

1. The main question in this case involves the power of the payee, Isaac J. Cooper, to whom the notes were executed, to assign the same.

The appellant, Rankin, contends that the notes given to Isaac J. Cooper, guardian of Jacob Cooper and Priscilla Cooper, were not the property of said Isaac J. Cooper, in such manner as to authorize him to assign or transfer them.

In the opinion of this court, the notes were the property of said Isaac J. Cooper. He had the legal right to them, and therefore he could sell or assign or transfer them, and his assignee, for value, without notice, would hold them, and have a right to

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the money arising thereon. The assignee, Thornton, then, in this case, has the legal right to the notes in question and to the money arising thereon.

There is no question as to the manner in which Thornton obtained the notes; he paid value for them. The payee, Isaac J. Cooper, transfers to him notes before they become due, and the only way in which Rankin wishes to implicate Thornton, and to affect him with notice, arises from the words "guardian," &c., which follow Cooper's name on the face of the notes. We do not consider that these words import any impediment to the right which the payee in them had to sell or transfer them; but that, notwithstanding these words, the full title to the notes and the money they call for was vested in said Isaac J. Cooper.

In the case of *Trumbull and others v. Freret*, a note was given thus: "Good for one thousand six hundred and forty-three Spanish milled dollars, payable on the first day of January next, to the order of Mr. Charles Norwood, executor of Messrs. Trumbull & Joyce, for balance due to the estate. New Orleans, 1st January, 1802. Signed, Jas. Freret." The Supreme Court of Louisiana held that the words, "as executor," in this note, can be considered in no other light than as words of description; that the legal title to receive the money vested in Norwood, and the heirs cannot pass it by, and commence an action in their own name. 5 Martin's Rep. New Series, 703.

This court has held the same doctrine as to words of description. These notes, then, on their face, were the property legally of the said Isaac J. Cooper, and he was entitled to receive the money they called for, and being the owner and payee, he had the right and authority to assign the same, and his assignee to have and receive the money due thereon.

In the case of *Jeffries v. McLean and others*, 12 Mo. Rep. 538, the bond sued upon was as follows:

"For value received, we, or either of us, promise to pay A. Ransom, guardian of J. G. Roberts, the just sum of three hundred and forty-nine dollars and fifty cents, without defalca-

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the upper story as a boarding house. At the time of his death, he had chattels of the value of \$180 to \$200 in the shop, and household furniture of the value of \$100 in the upper story. He left no money to pay his funeral expenses or the expenses of his family; and his widow, being sick, procured the defendant to sell the stock in the shop for the purpose of paying the funeral expenses. Delaney, accordingly, took an inventory on the day after O'Keefe died, and kept the shop open a week or ten days, during which time he sold stock to the amount of \$170 or \$180. He paid over the proceeds to the widow, and acted in the whole matter for her. The widow applied the money to the payment of funeral expenses, rent, and wages of hands in the shop and servants in the house. Afterwards, she was appointed and qualified as administratrix of her husband's estate. Under the instructions of the court below, the plaintiff submitted to a nonsuit, and appealed to this court.

Frémon & Reber, for appellant. The defendants were liable as executors *de son tort*. 1 Williams on Executors, 210-1-2. They could not defend under the authority of the widow, for she also was a wrong-doer, and they knew it. Williams, *supra*. Payment of the money to the widow, before her appointment as administratrix, is no defence. Her bond did not cover the money. The goods sold were not properly administered. Part of the money was applied by the widow to the payment of demands of the same degree as the plaintiff's.

H. N. Hart and *J. H. Reed*, for respondents, cited Toller on Executors, 39, 367. 3 T. R. 590. Comyn's Dig. tit. Administrators, ch. 3. 8 J. R. 126. Moore, 126. 15 Mass. 307. 1 Salk. 313.

RYLAND, Judge, delivered the opinion of the court.

1. Do the facts set forth in the statement make the defendants, Ryan & Delaney, executors of their own wrong, of the estate of Thomas O'Keefe?

It seems that, at the death of O'Keefe, the defendants were the agents of his widow, and she, being without means to support the family, having no money on hand to pay the funeral expenses with, or to procure sustenance for herself and children, she being sick at the time, procured Delaney to sell the stock for the purpose of paying the funeral expenses; that he paid over to her (the widow) all the proceeds of such sale, and she paid out all the money she received, for funeral expenses, for wages of servants in the house, for wages of hands in the shop, and for the rent of the house. It seems that the value of the goods in the shop was from \$180 to \$200, and that the household goods were worth about \$100; that the widow was regularly appointed administratrix of the estate of her deceased husband, before this suit was instituted. Now, from an examination of the evidence on the record, it must strike every one that all that these defendants did, in regard to this estate, was done by the procurement and direction of the widow; it was done for her and by her orders and commands. If any one, then, was executor of his own wrong in this case, it was the widow, and by her taking out letters of administration, the acts done were all legalized, and this suit cannot be maintained against these defendants. The widow was the principal; she was directing, and these defendants were but her agents or servants. These defendants did not interfere with the goods of the estate of their own voluntary choice; they assumed to exercise no control or rights in and to the property; all that they did was done by the order of Mrs. O'Keefe, the widow, and must, in law, be considered as her acts, and they merely her agents.

From the amount of the valuation of the property, there is some doubt whether the widow was not entitled to the whole. She is allowed to take \$200 of the estate at the appraised value, in preference to the creditors; and this, too, in addition to "all the wearing apparel of the family, wheels, looms and other implements of industry; all yarn, cloth and clothing made up in the family for their own use; all grain, meat, veg-

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etables, groceries and other provisions on hand, and provided and necessary for the subsistence of the widow and her family, for twelve months, and as many beds, with bedding, as shall be necessary for herself and the family of the deceased, residing with her and under her control."

The case of *Givens v. Higgins, Executor of Higgins*, 4 McCord, 286, is somewhat similar to this: the action was to recover a demand which the plaintiff had against Robert Givens, deceased, from the defendant, as executor *de son tort*. The debt was proved. It was then proved that, immediately after the death of Givens, the defendant employed a wagoner and removed the effects about five miles; that he paid a debt against Givens with some of the property; that he was twice seen riding a horse which belonged to Givens, and had occasionally ploughed with the horse. The defendant then proved by the widow that she was sick when her husband died, and that she had requested the defendant to move her and her property to her mother's, and that all the other acts were performed by the defendant at her request.

The court held that the acts of intermeddling, as proved, were not sufficient to constitute the defendant executor *de son tort*; and that they being done at the request of the widow, was a sufficient justification and explanation of his conduct. The jury found a verdict for the defendant; a new trial was moved and refused. The court stated, in overruling the motion for a new trial, that "there is no doubt that any intermeddling with the estate of a deceased person, such as collecting money, paying debts with the funds of the estate, or making any other disposition of any part of the property, will make a person executor of his own wrong. In some of the old cases, the doctrine has been carried to an extravagant, even to a ridiculous extent. A person has been held liable as executor in his own wrong, for taking a dog, and a wife for milking the cow of the deceased husband. But such a principle would not be sustained at this day. The intermeddling must be such as to manifest a right to control or make disposition of the effects

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the deceased. Acting merely as a servant will not make a person so liable. Per Buller, J., in *Padget et al. v. Priest et al.*, 2 T. R. 97. Thus, for instance, if a widow should employ an overseer to superintend the plantation of her deceased husband; a wagoner or boatman to carry the crop to market, a factor to sell it, and a clerk to collect and pay away the money under her directions, these several persons, not knowing in what character she was acting, would be considered merely as her agents, and not as exercising such control over the funds of the estate as to make themselves liable. Such appears to have been the character in which this defendant acted; he acted merely as the agent of the widow. He did not pretend to have any control over the property, and knew not, probably, to whom it belonged. There are many acts which a person may do without making himself executor *de son tort*; such as locking up the goods for preservation; directing the funeral in a manner suitable to the estate which is left, and defraying the expenses of such funeral himself, or out of the deceased's effects; making an inventory of his property; feeding his cattle; repairing his houses, or providing necessaries for his children; for these are offices merely of kindness and charity. 1 Williams on Executors, 215. When an executor *de son tort* takes out letters of administration, his acts are legalized, and are to be viewed in the same light as if he had been rightful executor, when the goods came into his hands. 15 Mass. Rep. 325, *Andrew v. Gallison's Executor*. 8 John. 126, *Ratloon v. Overacker*. Letters of administration have relation back to the death of the intestate. 1 Williams on Executors, 334.

Under this view of the law governing such cases, the court below decided properly. We will not notice the instructions given or refused, in order to make a critical examination of them. We are satisfied, from the facts in proof, that the defendants are not executors of their own wrong; that, if there was any such executor *de son tort*, it was the widow, and her appointment and qualification as administratrix before the

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commencement of this suit, and after the acts charged to have been done, afford a complete defence to such suit, if it had been brought against her.

The judgment below is affirmed, with the concurrence of the other judges.

DOGGETT, Respondent, vs. THE ST. LOUIS MARINE AND FIRE
INSURANCE COMPANY, Appellant.

1. The validity of a specific assignment of a debt may be tried in an issue between the plaintiff in an execution against the assignor, and the debtor summoned as garnishee of the assignor.
2. A justice may render judgment against a garnishee for an amount within his jurisdiction, although the indebtedness of the garnishee to the defendant exceeds the jurisdiction of the justice.

Appeal from St. Louis Law Commissioner's Court.

Doggett, having recovered judgment against Meyer before a justice of the peace, for an amount within his jurisdiction, caused the St. Louis Marine and Fire Insurance Company to be summoned as garnishee on the execution. The secretary appeared and answered that Meyer effected an insurance in the company to the amount of \$600, upon property which was afterwards, and during the continuance of the policy, destroyed by fire; that a claim for the loss was presented by Meyer on the 3d of June, 1852, and allowed on the 9th of August, 1852; that on the 13th of June, 1852, and prior to the service of the garnishment, the company was served with a notice of the assignment of the claim by Meyer to William Dawson. The plaintiff in the execution took issue upon this answer, and the justice caused Dawson to be notified to appear and establish his assignment. The trial before the justice resulted in a judgment for the garnishee. An appeal was taken to the law commissioner's court, where there was a trial, which resulted

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in a judgment against the garnishee, in favor of the plaintiff, for the whole amount of his demand. The garnishee appeals to this court.

J. B. Thompson, for appellant. 1. The justice had no jurisdiction to try the validity of the assignment of the policy. The validity of an assignment cannot be put in issue in a garnishment upon an execution. *McEvoy v. Lane & McCabe*, 8 Mo. Rep. 322. *Van Winkle v. McKee*, 7 Mo. Rep. 435. *Walden v. Valiant*, 15 Mo. Rep. 409. 13 Mo. Rep. 157. 2. A justice has no jurisdiction to render judgment against a garnishee, when his indebtedness to the defendant exceeds the justice's jurisdiction.

Carroll & Woods, for respondent.

GAMBLE, Judge, delivered the opinion of the court. .

But two questions have been presented for consideration in this case : 1. Whether, when a garnishee summoned on a *fi. fa.*, answers, admitting his indebtedness to the defendant, but alleging that the debt is claimed by an assignee of the defendant, an issue can be made between the plaintiff and the garnishee, to try the question of fraud in the assignment, so as to make the garnishee liable to a judgment in favor of the plaintiff, if the assignment is found to be fraudulent. 2. Whether a justice has jurisdiction to render judgment against a garnishee, when it appears that his indebtedness to the defendant exceeds the jurisdiction of the justice.

1. The first question has been presented under a misapprehension of the decision in *Van Winkle & Randall v. McKee & Baum*, 7 Mo. Rep. 435. In that case, McKee had made an assignment to Baum in trust for his creditors, and the assignment was fraudulent upon its face, because it required the creditors to release McKee, in order to have any benefit under the assignment. V. W. & R. having an execution against McKee, summoned Baum as garnishee. The question presented and decided was, whether Baum, the assignee, was a debtor

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to McKee, the assignor, so as to be summoned as a garnishee, under a statute authorizing the officer, when he could find no property on which to levy an execution, to summon, as garnishees, all "*debtors*" of the defendant. It was held that, whether the deed of assignment was fraudulent or not, as to creditors, it was clearly good between the parties, and therefore could not make Baum, the trustee, the debtor of McKee, the assignor.

In that case, the court remarked: "The creditors may treat it (the assignment) as a nullity, and sue out their executions, the liens of which will attach on all property subject to execution, from the time they are placed in the hands of the sheriff, and it may be seized and sold under them; and if there are debts conveyed by the assignment, *the persons owing those debts may be summoned as garnishees.*" The course indicated in this passage as the correct course to be pursued, is to be used where there has been a fraudulent transfer of property or debts, and it may be adopted where a garnishee is to be summoned on execution. When a person is summoned as a debtor of the defendant, and in his answer states the fact of an assignment of the debt to a third person, if such assignment is fraudulent as to the plaintiff, who is an execution creditor, then the garnishee is, so far as that proceeding is concerned, the debtor of the defendant, and not of his assignee, and may be required to pay the money to satisfy the plaintiff's judgment. There is no other inconvenience in proceeding to determine the question of the validity of the assignment in this case, than would arise in any case in which a garnishee admitted himself to have been the debtor of the defendant, and then stated that some third person claimed the debt as assignee. In all such cases, the plaintiff has a right to have the fact tried, whether the garnishee is still the debtor of the defendant, so as to be liable to pay his judgment.

2. The second question is not thought to present any difficulty. 'When a justice of the peace has rendered a judgment for a sum within his jurisdiction, and is proceeding against a

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garnishee summoned on the execution, he is only proceeding to have the original judgment satisfied; and although the garnishee may owe the defendant a thousand dollars, the justice only adjudges that he owes him the amount of the judgment, interest and costs, of which he has already exercised jurisdiction. He does not give judgment against the garnishee for the amount of his indebtedness.

The judgment is, with the concurrence of the other judges, affirmed.

McDERMOTT, Appellant, vs. BARNUM & MORELAND, Respondents.

1. An instruction which tells the jury that they may infer a certain fact from other facts proved, is not the decision of any question of law, unless the presumption is one which the law raises.
2. If A. leaves his personal property in the possession of B., and with knowledge that he is holding himself out to the world as the owner of it, stands by and permits this conduct, he will be estopped from afterwards claiming the property as his own, against parties who have trusted B. upon the faith of it; nor is it necessary that A. should have known that B. designed to commit a fraud upon his creditors.
3. A case will not be reversed because irrelevant evidence was allowed to go to the jury, unless it could have misled or prejudiced them.
4. Certified transcripts from justices of the peace are evidence, without proof of the justice's signature.

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T. C. Reynolds, for appellant, argued at length the following, among other points: 1. The instructions given did not present the law to the jury fairly, nor in accordance with the former opinion of this court, and the instructions asked by appellant should have been given. 2. Irrelevant evidence was admitted, calculated improperly to prejudice the minds of the jury. 3. The transcripts from the justice of the peace should have been excluded. A justice's signature does not prove it-

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self. One of the transcripts was a nullity on its face, for want of bond and affidavit by the plaintiffs.

Polk and Dayton, for respondents.

GAMBLE, Judge, delivered the opinion of the court.

The facts of this case are stated in the report of the former decision, in 16 Mo. Rep. 115.

McDermott claims the slave in question as a purchaser from John C. Rogers & Co., in Virginia; that firm was composed of John C. Rogers, Hugh Rogers and one Lowe. The defendants claim as purchasers under an execution sale of the slave as the property of Hugh Rogers.

After McDermott obtained the conveyance of this, and other slaves, from J. C. Rogers & Co., he sent them, in care of one Janney, to the south for sale. Janney sent the slave in question to Hugh Rogers, at New Orleans, for sale, and Hugh brought him to St. Louis, where he kept him in his employment for some time, and exercised over him the ordinary acts of ownership, and held himself out as the owner, until the slave was seized and sold under execution.

The defendants insisted that the whole transaction between McDermott and John C. Rogers & Co. was fraudulent, and that the circumstances under which the slave had come to the hands of Hugh Rogers, and his subsequent conduct in relation to the slave, with the assent of McDermott, authorized the seizure and sale of the slave as his property.

There was much evidence given by the defendants on the trial, to which the plaintiff objected, on the ground that it was irrelevant.

It is not intended to review at length the different instructions which the plaintiff asked, and which were refused, nor those which were given on the motion of the defendants. The instructions on the last trial differ from those which were asked at the former trial, and which appear in the report of the case as referred to.

When the case was before decided in this court, the judg-

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ment was reversed on account of the giving of the fourth instruction asked by the defendant. That instruction has been changed, so that on the last trial it reads in these words : " If the jury find from the evidence, that the plaintiff himself or by his authorized agent, *in collusion and fraud with John C. Rogers & Co., or any member of said firm, against the creditors of said firm,* delivered the slave in the declaration mentioned to said Hugh Rogers, one of the firm of John C. Rogers & Co., and suffered and permitted him to retain the possession of, and to use and control the said slave as his own property ; that, while said Hugh was so in possession of said slave, and controlling him as his own, he was regularly levied on and sold to satisfy one or more executions against said Hugh ; that the defendants became the purchasers of said slave at such sale, without any notice of the claim of the plaintiff, the verdict ought to be in favor of defendants." The change in the instruction was made by inserting the words in italics. The meaning of this instruction must be, that the delivery of the slave by McDermott to Hugh Rogers, and his suffering Hugh to retain and use the slave as his own, were both in fraud of the creditors of Rogers & Co., and in order that the jury, under this instruction, could find that fact, it was necessary that they should believe that the whole transaction between McDermott and Rogers & Co. and Hugh Rogers, was a mere juggling contrivance to keep the property out of the reach of the creditors of Rogers & Co. It was necessary that they should believe this, because it was impossible that the delivery of the slave to Hugh Rogers, and allowing him to treat him as his own property, could be a fraud upon the creditors of Rogers & Co., if McDermott was a *bona fide* owner. Putting his property into the hands of Hugh Rogers could not be fraudulent as to the creditors of Rogers & Co., or any other creditors, except his own. The instruction, then, as altered, although obscure in its present shape, requires the jury to find that all the transaction was fraudulent before they could, under its direction, find for the defendant.

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1. The fifth instruction is, in reality, no instruction upon a question of law. Fraud, as a question of fact, was presented to the jury, and this instruction, after detailing several facts, informs the jury that if they find them to exist, they may from them infer that the sale from Rogers & Co. to McDermott was fraudulent. In other words, the jury are told that certain circumstances would justify the conclusion that a conveyance was fraudulent in fact. This is more like a summing up of evidence than an instruction on a question of law. When the law presumes a fact from one or more other facts, the annunciation to the jury of that presumption is a declaration of the law of the case, and differs very materially from telling them, in a case where there is no presumption of law to guide them, that, if they believe that certain facts are proved, then they may infer the existence of the principal fact in question. I repeat that the giving or refusing such an instruction, in such a case, is not properly the decision of any matter of law.

The instructions given by the court, at the request of the plaintiff, contain a sufficient statement of the law applicable to the evidence, to enable the jury to determine the case upon its merits. The first tells them that, if they believe that McDermott was a *bona fide* purchaser from Rogers & Co., and that the slave was delivered to McDermott and continued in his possession; that he afterwards was entrusted by McDermott or his agent to Hugh Rogers for sale, and that Rogers, without authority, consent, or acquiescence of McDermott, converted the slave to his own use and claimed him as his own property, they should find for plaintiff. The third informs the jury that, if McDermott entrusted the slave to his agent, Janney, with special authority to sell him and remit the proceeds, Janney could not delegate this authority to another without the consent of McDermott, and if he did, without such consent, deliver the slave to Hugh Rogers, to be sold by him and the proceeds remitted, Rogers did not thereby become McDermott's agent, and the acts of Rogers, in relation to the slave, are not binding on McDermott, unless he knew of and assented to, or acquiesced in.

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such acts. The fifth informs the jury that, if McDermott acquired the slave from Rogers & Co., for a valuable consideration, he acquired a good title, although Rogers & Co. might have intended to delay, hinder and defraud their creditors, unless he knew of such intent, and made the purchase to aid them in their fraudulent intent. The sixth maintains the proposition that the conveyance is to be presumed to be *bona fide* until fraud in it is shown by evidence, and that, in considering the question of fraud, the jury are to regard the whole evidence, and only find the existence of a fraudulent intent when the whole evidence satisfies their minds of the fact.

2. The second instruction asked by the plaintiff, and which was refused by the court, lays down the propositions that, if McDermott was a *bona fide* owner of the slave, and if Hugh Rogers, being in possession of the slave, represented himself to be the owner, and used the slave as his own property, still the jury must find for the plaintiff, unless McDermott knew the facts that Rogers was so representing the slave to be his, and was using him as such, *and thereby designed to commit a fraud on his creditors or others.*

If the last words of the instruction require that McDermott should know of a design of Rogers to commit a fraud upon his creditors or others, in order to render the property subject to the debts of Rogers, the proposition is erroneous; for if he knew that Rogers was holding himself out to the world as the owner of the slave, and was dealing with him as his own property, and he stood by and permitted this conduct of Rogers, he cannot escape the claims of Rogers' creditors, by requiring them to prove that he knew of Rogers' design to defraud them. When they have trusted him on the credit of such property, or when another person has purchased from him, the ground upon which the real owner is prevented from claiming the property is, that it would be a fraud upon the creditors or purchasers that he should be permitted to assert his claim, after having, by his silence, allowed others to treat it as the property of the possessor. The rule is in the nature of an estoppel. Taking

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the meaning of the last part of this instruction to be that before stated, it was erroneous, and if it have any other meaning, it is too ambiguous to guide a jury. The fourth instruction was properly refused, as inapplicable to a case in which fraud was charged to exist in the relations between McDermott and Rogers. A title that might be valid between them, might be fraudulent and void as to the creditors of Rogers. So, the acquiescence of McDermott in Rogers' acts and representations, might have no effect upon his claim to the property, between themselves, when it would prevent the assertion of his claim against a creditor or purchaser.

The eighth instruction was properly refused. It asserts that, if McDermott acquired title to the slave in the manner stated in the evidence, that is, by conveyance from John C. Rogers & Co., and if the slave afterwards got into the possession of Hugh Rogers, in the manner, that is, by delivery from Janney, agent of McDermott, and that the possession was continued with the knowledge of McDermott, still such possession by Rogers, and the use of the property as his own, though with the knowledge of the plaintiff, does not divest the title of the plaintiff, unless it was the design and purpose of the plaintiff to aid and assist said Rogers, by his possession and use of the slave, to hinder, delay and defraud his creditors. The observations made upon the fourth instruction are applicable to this. The design to aid Rogers in cheating his creditors is not necessary to make the title to the property of the plaintiff pass by a sale for Rogers' debts, if he allowed Rogers to hold himself out as owner, and to treat and use the property as his own.

3. Objection has been made to several portions of the evidence given by the defendants, on the ground of irrelevancy. In *Lane v. Kingsbury*, 11 Mo. Rep. 410, in the opinion delivered by Judge Scott, it is said: "In investigations of this kind, (a question of fraud was in the case,) the courts should lend an unwilling ear to the objection of irrelevancy merely. If the evidence is merely irrelevant, it cannot affect the rights of an objector. It is always best for the courts to err on the

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safe side." The Judge further remarks, "that when the tendency of the evidence is to mislead or improperly prejudice the mind of the jury, it must be rejected, though irrelevant to the issue."

When we are examining a case that has been tried by a jury, we are bound to presume that evidence which is irrelevant to the question they are required to decide, will have no weight in the decision, unless the natural tendency of the evidence is to mislead or prejudice the mind, so as to interfere with a correct decision of the question. In all cases in which a fact is attempted to be proved by circumstances, and not by evidence going directly to its existence, the jury must be supposed to be capable of giving a just weight to each circumstance, and it is very unsafe for a court to reject the evidence of one of the circumstances, because, in the mind of the judge, it is entitled to very little consideration. Take, as an example, the evidence given by a witness in this case, that the man who murdered Maj. Floyd was arrested in the stable of Hugh Rogers, and that the circumstance was published throughout the United States. The object in giving this evidence, was to establish notice in McDermott, a resident of Virginia, of the residence and employment of Rogers. The court could not know how far the defendants would follow up this testimony with evidence that McDermott read such publication, and therefore it would have been unsafe to reject it. If this was all the evidence to be given, to carry home to McDermott notice of the newspaper publication, then we are bound to assume that the jury were intelligent enough to see the utter absurdity of such evidence, as the foundation of a charge of notice to plaintiff of Rogers' residence.

There is upon the record some evidence so entirely irrelevant, that it might, with perfect propriety, have been rejected, but which we cannot suppose had any influence in producing the verdict, and therefore we will not, on that account, disturb the judgment. An objection was made to the relevancy of the affidavit made by Hugh Rogers, on the institution of this suit, but

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that affidavit was clearly relevant to the question of, whether there was a fraudulent combination between the plaintiff and Rogers.

4. An objection was made to the competency of certain transcripts produced from a justice of the peace, because they were certified by the justice and were not sworn copies. The 21st section of the act concerning evidence, (R. C. 470,) makes certified copies from a justice evidence. It was objected to one of these transcripts, that the judgment was a nullity, because there was not a bond and affidavit appearing on the transcript. This was no objection to the evidence in this case. The proceeding was against Rogers, and the action was collateral to this.

Upon the whole case, there appears to be no question of law upon which the judgment should be reversed, and this court does not act upon the sufficiency of the evidence to maintain the positions assumed by the respective parties. The judgment will therefore be affirmed, with the concurrence of the other judges.

THE STATE, Appellant, vs. HOUSTON, Respondent.

1. An indictment against A. for inciting B. to a murder, by mistake charged that he incited A. *Held*, fatal.

Appeal from Cape Girardeau Circuit Court.

RYLAND, Judge. The defendant, Samuel Houston, was indicted for inciting William R. Sumner to murder one Charles Krehbul. The indictment was, on his (Houston's) motion, quashed. The circuit attorney excepted, and brings the case here by appeal. In looking into the indictment, it appears that the pleader has charged Houston, not with inciting, aiding, abetting, &c., said William R. Sumner to do the murder, but he charges Houston with inciting, moving, abetting and coun-

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selling Houston himself to commit the murder—a mistake, no doubt, but a fatal one. The judgment of the Circuit Court is affirmed, the other judges concurring.

THE STATE, Appellant, vs. JORDAN, Respondent.

1. An indictment for an assault with intent to kill must aver that the assault was with a deadly weapon.

Appeal from Dunklin Circuit Court.

RYLAND, Judge, delivered the opinion of the court.

The defendant, Charles Jordan, was indicted at the September term, 1852, of the Circuit Court for the county of Dunklin, for making an assault upon one Hiram Langton, with intent to kill. At the March term, 1853, the defendant appeared and moved the court to quash the indictment. The court sustained his motion. The State, by her circuit attorney, excepted, and brings the case here by appeal.

The only question presented by the record is, the sufficiency of the indictment. In the indictment it is charged, "that Charles Jordan, late of the county of Dunklin, on, &c., with force and arms, at, &c., in and upon one Hiram Langton, in the peace of the state, then and there being, feloniously, wilfully, on purpose and of his malice aforethought, did make an assault, and that the said Charles Jordan, with a certain deadly weapon, to-wit, a pistol of the value of two dollars, which said pistol was then and there loaded with gunpowder and one leaden ball, which he, the said Charles Jordan, in his right hand, then and there had and held, on, at and against the said Hiram Langton, with the intent then and there, thereby him, the said Hiram Langton, feloniously, wilfully, on purpose, and of his malice aforethought, then and there to kill and murder, contrary," &c.

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The pleader has omitted to state, that the defendant assaulted Langton with the pistol. He has omitted to state the facts constituting the assault with a deadly weapon. The indictment, therefore, is insufficient, and it was properly quashed. The judgment of the Circuit Court is affirmed, Judge Scott concurring; Judge Gamble not sitting.

THE STATE, Respondent, *vs.* PAGE & BACON, Appellants.

1. An indictment framed under the first and second sections of the act to prevent illegal banking, (R. C. 1845,) which charges the defendant with making or putting in circulation a note, bill, check or ticket *purporting* that money will be paid to the *receiver* or *holder* thereof, or that it will be received in payment of debts, can only be sustained by the production and giving in evidence of a note, bill, check or ticket, which, *upon its own face*, declares that money will be paid to the receiver or holder thereof, or that it will be received in payment of debts. (Scott, J., dissenting.)
2. The word "*purporting*," in the first section of the act, does not apply to the last clause of the section. This clause is violated whenever a party creates or puts in circulation notes, bills, checks or tickets "to be used as a currency or medium of trade in lieu of money," whatever may be their purport.

Appeal from St. Louis Criminal Court.

Glover & Richardson, Leslie & Barrets, for appellants. The evidence did not sustain the indictment. The indictment charges the defendants with creating, putting in circulation, signing, countersigning and endorsing notes, bills, &c., purporting that money will be paid to the *holder* or *receiver* thereof, &c. The notes offered in evidence purported to be payable to *bearer*. The word "*purporting*" in the indictment and in the statute, is a word of technical import, and signifies that the notes, bills, &c., *on their face* are made payable to the receiver or holder. Archbold, 47. 2 Russell on Crimes, 343 to 349. *King v. Jones*, 1 Doug. 302. 4 Cranch, 167. The word "*purporting*," in the indictment, was demanded by

the law. The word in the statute is connected with all the subsequent members of the sentence. But whether the law required the word to be used or not in the indictment, yet as it has been used, it must be supported by the evidence. This very point was settled in 4 Mo. Rep. 572.

H. A. Clover, for the State. The word "*purport*," as used in the statute, must be held to signify the legal purport, in contradistinction from the apparent purport, in order to give force and efficacy to the law of the state. There is a distinction between the meaning of the word "*purport*," when used in pleading, and when used in a statute. Where a pleader *unnecessarily* uses the term in pleading, the instrument produced in evidence must appear, upon the face of it, to be what it is described as purporting to be, because this is its apparent import, and the pleader might have used other words, as "to the tenor," "to the effect." The legal purport, on the other hand, is its legal effect, and the legal purport is properly set forth in the indictment. The court is urged to review the decision of *Downing v. The State*, 4 Mo. Rep. 572. To construe the term "*purport*" as contended for, would be to render the statute nugatory, against any one who chooses to evade it.

RYLAND, Judge, delivered the opinion of the court.

In this case, the indictment charges that Daniel D. Page and Henry D. Bacon, being money brokers and exchange dealers, doing business under the name, style and firm of Page & Bacon, in St. Louis county, on, &c., at, &c., with force and arms, being unauthorized by law, and whilst they were money brokers and exchange dealers aforesaid, unlawfully did create and put in circulation, as a circulating medium, divers notes, bills, checks and tickets, purporting that money will be paid to the receiver, holder and bearer thereof, said notes, bills, checks and tickets to be then and there used as currency and as a medium of trade in lieu of money, and that said notes, bills, checks and tickets will be received in payment of debts, that is

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to say, fifty notes each of the denomination of one dollar; fifty notes each of the denomination of three dollars; fifty notes each of the denomination of five dollars; fifty bills each of the denomination of one dollar, &c.; fifty checks each of the denomination of one dollar, &c.; fifty tickets each of the denomination of one dollar, &c.—(in like denomination as the notes,) against the peace, &c., of the state.

The second count charges, that said defendants unlawfully did issue, sign, countersign and endorse divers notes, bills, checks and tickets, then and there created and put in circulation as a circulating medium, and purporting that money will be paid to the receiver, bearer and holder thereof, and then and there to be used as currency, and as a medium of trade in lieu of money, to-wit: forty notes each of the denomination of one dollar, &c.; forty bills each of the denomination of one dollar, &c.; forty checks each of the denomination of one dollar, &c.; forty tickets each of the denomination of one dollar, &c.; describing them as of various denominations, from one to five dollars, against the peace and dignity of the state.

At the March term, 1853, of the St. Louis Criminal Court, the defendants were tried and convicted, and fined each one thousand dollars. Motions in arrest of judgment and for new trial were made, overruled and excepted to, and the defendants bring the case here by appeal.

The defendants complain, that the court below admitted improper evidence to be given on the part of the State in support of this indictment.

The certificates or instruments offered in evidence in support of the prosecution, and charged to have been created and put in circulation, and those charged to have been issued and signed by the defendants and put in circulation, are as follows:

No. 939.	Page & Bacon	A	Five.
5	Banking House,	St. Louis, Mo.	
(Vignette.)	(Vignette.)		
St. Louis,	January 1, 1852.		
This certifies, that Thos. Brown has deposited in			5

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this office, five dollars, payable to bearer, at the (Vignette.)
banking house of Flagg & Savage, Quincy, Ills.

PAGE & BACON.

3 No. 3631. Page & Bacon. A
Banking House. (Vignette.) Three.

St. Louis, Mo.

January 1, 1852.

St. Louis,
(Vignette.) This certifies Thos. Brown has deposited in this
office, three dollars, payable to bearer, at the banking house of
Flagg & Savage.

Three. PAGE & BACON. (Vignette.)

1 No. 5416. Page & Bacon. A
(Vignette.) Banking House. (Vignette.) One.

St. Louis, Mo.

January 1, 1852.

This certifies, that Thos. Brown has deposited in this office,
(Vignette.) one dollar, payable to bearer, at the banking
house of Flagg & Savage.

Quincy, Ills.

One. PAGE & BACON. (Vignette.)

The defendants objected to the offering and giving these cer-
tificates in evidence to the jury; the court permitted them to
be read in evidence, and the defendants excepted.

1. In the opinion of this court, the Criminal Court erred in
permitting these certificates to be read and given in evidence
before the jury, under any count of the indictment.

The indictment charges that the defendants did create and
put in circulation, and did issue, sign, countersign and en-
dorse divers notes, bills, checks and tickets, "*purporting*"
"that money will be paid to the receiver, bearer and holder
thereof." The word "*purporting*," in the indictment and in
the statute, is a word of technical meaning. Buller, J., in
delivering the opinion of the judges in Reading's case, 2 Leach,
590, said: "It is clear that, where an instrument is to be set

forth, the description that it *purports* a particular fact, necessarily means that what is stated as the purport of the instrument, appears on the face of the instrument itself." Again, in Gilchrist's case, 2 Leach, 657, Buller, J., in delivering the opinion of the judges, said: "Old cases have given rise to much learning and argument on the words "purport" and "tenor," and the books are full of distinctions as to the meaning of these words, and the necessity of using the one or the other of them in indictments, where written instruments are to be stated; but among the many cases upon this subject, I can find no judicial determination that the purport and the tenor should both be stated in any case whatever. Purport means the substance of an instrument, as it appears on the face of it to every eye that reads it; tenor means an exact copy of it." Russell says, but with respect to the word "purport," it should be well observed, that it imports what appears on the face of the instrument, as a want of attention to this meaning of the word has been fatal to many indictments. 2 Russell on Crimes, 345, side p. 364.

Archbold, in his "Criminal Pleadings," p. 58, says: "If an indictment describe a written instrument as purporting to be so and so, the instrument, when produced in evidence, must appear upon the face of it, to be what it is described as purporting to be; otherwise the defendant will be acquitted for variance. In the case of the *King v. Jones*, Doug. Rep. 289, Lord Mansfield said, "the representations of the prisoner to Royner, after the note was made, could not alter the *purport*, which is what appears on the face of the instrument itself."

There is no necessity for searching the books any further upon the subject, as this court recognized the same principle, and referred to some of the books above quoted, in the case of *Downing v. The State*, 4 Mo. 572, opinion by Judge Tompkins and concurred in by Judge McGirk.

In the case of *Downing v. The State*, the indictment charged, that Downing put in circulation, &c., a certain note, purporting that five dollars will be paid to the holder thereof, and

the note offered in evidence purported that five dollars would be paid to the bearer thereof. The court said, this is clearly a wrong description of the note, and for this reason the judgment ought to have been arrested. The court, in the opinion delivered, remarked, that it is certain that the legal effect of the note, as set out in the indictment, and, as it is proved, is the same, but as it was attempted to describe the note, not according to its legal effect, but to describe it as it existed, it should have been so done; that such is the meaning of the word *purport*, is sufficiently established by authority. This decision was made in 1837, and the use of the word *purport* and its technical meaning, was thus made known by the highest judicial authority of this state. The words of the statute of 1835, under which Downing was indicted, are as follows: "No person unauthorized by law, shall intentionally create or put in circulation, as a circulating medium, any note, bill, check or ticket, purporting that any money will be paid to the receiver or holder thereof." R. C., 1835. In the Revised Code of 1845, the words, "or that it will be received in payment of debts, or to be used as a currency or medium of trade in lieu of money," are added.

We cannot then, suppose, that the legislature, in their Digest of 1845, used the word "purport" or "purporting" in a different sense from the judicial interpretation given to it in the statute of 1835.

We adhere to the decision of the court in Downing's case, and, consequently, the judgment of the Criminal Court must be reversed. Judge Gamble concurs in this opinion; Judge Scott dissents.

GAMBLE, Judge. I concur in the opinion of Judge Ryland, that when an indictment, framed under the first and second sections of the act to prevent illegal banking, (R. C. 167,) charges the defendant with making or putting in circulation a note, bill, check or ticket, *purporting* that money will be paid to the receiver or holder thereof, or that it will be received in

payment of debts, the indictment can only be sustained by the production and giving in evidence of a note, bill, check or ticket, which, upon its own face, declares that money will be paid to the receiver or holder thereof, or that it will be received in payment of debts. I think it necessary, however, to state my views of the first section of the act which prohibits the making such paper or putting it in circulation. It is in these words: "No person, unauthorized by law, shall create or put in circulation, as a circulating medium, any note, bill, check, or ticket, purporting that any money will be paid to the receiver or holder thereof, or that it will be received in payment of debts, or to be used as a currency, or medium of trade in lieu of money."

2. It has been said that a person cannot be punished under this act for making and circulating any paper that on its face has not the purport mentioned in the statute, if the word "purport" is to have the signification usually given to it in the decisions of courts. This, as I apprehend, is a misconstruction of the section. The section prohibits the creation or putting in circulation of paper purporting that money will be paid to the receiver or holder, or purporting that it will be received in payment of debts. This is as far as the word "purporting" applies to the acts prohibited. The next and last clause in the section, "or to be used as a currency, or medium of trade in lieu of money," is entirely distinct from those to which the word "purporting" applies, and embraces all cases in which any person creates or puts in circulation, as a circulating medium, "any note, bill, check or ticket to be used as a currency or medium of trade in lieu of money," whatever may be its purport. It is evident that this last clause of the section would be made nonsensical by applying the word "purporting" to it, so as to read, "*or purporting to be used* as a currency or medium of trade in lieu of money." The section then, prohibits, most distinctly, the issuing of paper designed to be used as a currency, without regard to the form in which it may be made, and under this section, there is no necessity for stating that

the purport of the paper issued is, that money will be paid to the holder, or that it will be received in payment of debts, if it is created or issued to be used as a currency or medium of trade in lieu of money. The prohibition is effectual, when the intention of the party is to make an unauthorized currency, whatever ingenuity may be employed in devising the form of paper to be issued.

In this view of the statute, Judge Ryland concurs.

SCOTT, J., dissenting. This was an indictment under the first section of the act to prevent illegal banking and the circulation of depreciated paper currency within the limits of this state. That section enacts, that no person, unauthorized by law, shall create or put in circulation, as a circulating medium, any note, bill, check or ticket purporting that any money will be paid to the receiver or holder, or that it will be received in payment of debts, or to be used as a currency or medium of trade in lieu of money.

It was contended for the defendants that, under this section, no indictment could be sustained, unless the bill put in circulation corresponded, literally, with the description contained in the statute. That is, unless the note, bill, check or ticket, on its face, was expressed in the identical words used in the act, the party charged with a violation of the law could not be convicted. The argument amounts to this: that, if the party intending to violate the statute, will take the precaution to avoid the use of the words "receiver" or "holder," in creating his circulating medium, and employ the terms "bearer" or "possessor," or any other than the identical words of the statute, how fully soever they may correspond with them in sense, he will be guilty of no violation of the law.

The case of the *State v. Downing*, 4 Mo. Rep., was relied on in support of the defence. That case holds that, on an indictment for putting in circulation paper, purporting that five dollars would be paid to the *holder* thereof, a note purporting to be payable to the *bearer* thereof, could not be given in evi-

dence, on the ground that the word "purporting," in the statute, means the same thing that it does in indictments for forgery; that it is a technical word, and means an exact copy, and unless there is a precise and literal correspondence between the instrument, as set out in the indictment, and that put in circulation, there is no offence against the law.

I know of no principle which requires that the word "purport" or "purporting," when found in a statute, should bear the same signification as when used in an indictment for forgery. In indictments for forgery and for sending threatening letters, the law requires the instruments to be exactly set forth, in order that the courts may be enabled to determine whether they are such as the law contemplates, when forgery and the sending of threatening letters are prohibited. In statutes the word "purporting" is usual, because its signification is so broad as to admit of a latitude of interpretation. Its sense is "meaning," "intending," "evidencing." Take the word as used in the third section of the act concerning conveyances, and give it the interpretation contended for, and the novelty of the argument will at once be perceived. So, take the word as used in various other parts of the code. I have never understood that in the construction of statutes, the word "purporting" was a technical one, or that it has any other sense than the popular one. It would be making a solecism to give it the interpretation desired, when used in statutes.

In order to comprehend this matter, it must be borne in mind that in framing an indictment under a statute, it is necessary to follow its words in the description of the offence. In drawing a count on the section under consideration, it is necessary to describe the instrument in the terms employed by the statute, otherwise the indictment will be bad. So that, under the construction contended for, if the individual intending to violate the law will only look at its terms, and in creating his circulating medium, instead of making it so that it will be paid to the "receiver" or "holder" (the words of the statute) will make it purport that it will be paid to the "bearer" or "pos-

essor" thereof, he will not be convicted, as the instrument does not literally follow the words of the law. So that, in order to make the statute answer the purpose for which it was designed, the offender must be complaisant enough to examine its terms carefully, and make his bills bear on their face its identical words, otherwise he need not hope to be convicted under it.

The law, as it now stands, corresponds with the act of 1835, with the exception of a single word, the omission of which does not, in the least, affect this question. The indictment, in the case of the *State v. Downing*, was framed under the act of 1825, and, notwithstanding that decision, with the omission of an unimportant word, that statute was re-enacted in 1845, with a reference to that decision. The act of 1835 was taken from that of 1825, the revision of 1835 adopting the course (as it is well known) of dropping all words deemed superfluous, and divesting the code, as far as practicable, of all unnecessary verbiage. Whether it was wise to change, in any way, the words of laws which were understood and approved, it is not for me to determine. The words of the act of 1825 are, "put in circulation any note, bill, check or ticket purporting or evidencing, or intending to purport or evidence, that any sum of money will be paid, &c. So here we have a legislative interpretation of the word "purporting," and that is, that it is "evidencing." According to this statute, purporting and evidencing are synonymes. Does "evidencing," too, mean an exact copy? I confess it is past my comprehension how the principle, which requires that, in some indictments, when you profess to give the purport of an instrument, you must set it out exactly, can affect the meaning of the word "purporting" in this or any other statute. Exact copy! copy of what? If you copy the note, the indictment will be bad, unless the party has been silly enough, in making his circulating medium, to adopt the very words of the law. So the statute is made a *felo de se* and destroys itself.

State v. Joe.

THE STATE, Respondent, vs. JOE, (A SLAVE,) Appellant.

1. No appeal lies in favor of a slave convicted before a justice of the peace of petit larceny.

Appeal from Marion Circuit Court.

Howell, for appellant. 1. The affidavit upon which the proceeding was based did not show a case of petit larceny. It did not show that the value of the property stolen was under ten dollars. 2. The Circuit Court should have taken jurisdiction of the appeal. To hold that no appeal lies would be monstrous. The constitution gives circuit courts a superintending control over justices of the peace.

H. A. Clover, (circuit attorney,) for the State. 1. The affidavit charges that the slave stole a fiddle of the value of one dollar, and a whip, of the value of one dollar, *and some clothing, with many other articles of merchandise.* The value of the property sworn to is two dollars and no more. The other matter is superfluous and may be rejected. 2. No appeal lies from the justice in a case like this. The statute under which the proceedings were had provides for none. If the Circuit Court can review the proceedings by virtue of its superintending control, it is not by appeal.

SCOTT, Judge. Joe, a slave, was tried and convicted before a justice of the peace, of larceny, and sentenced to be whipped. From this proceeding he appealed to the Circuit Court, where his appeal was dismissed. From this order he appealed to this court.

1. The question in this case is, whether the slave was entitled to an appeal. Although our views of this matter are such as restrain us from examining into the regularity of the proceedings of the justice, yet we deem it as well to say, that they appear to be conformable to law. The statute having prescribed a summary mode for the trial of slaves accused of petit

State v. Joiner.

larceny, and having allowed no appeal, there is no principle which would warrant the circuit courts in entertaining jurisdiction in such cases. Should justices of the peace exceed their jurisdiction, and transcend the limits of their authority, means of restraining them have been provided by law.

Judge Ryland concurring, the judgment will be affirmed. Judge Gamble absent.

THE STATE, Appellant, *vs.* JOINER, Respondent.

1. It will not vitiate an indictment for petit larceny, to charge that the larceny was *feloniously* committed.
2. Under section 22 of article 3 of the act concerning practice and proceedings in criminal cases, an indictment for petit larceny is properly quashed, unless the name of a prosecutor is endorsed upon it, or a statement which brings it within the exceptions to the requirement that the name of the prosecutor be thus endorsed.

Appeal from Wayne Circuit Court.

RYLAND, Judge, delivered the opinion of the court.

Gibson Joiner was indicted by the grand jury, at the September term, 1852, of the Circuit Court for Wayne county, for petit larceny, charged with stealing one wool hat of the value of two dollars. At the March term, the defendant appeared and moved the court to quash the indictment, because there is no prosecutor endorsed on the same, and because the stealing is charged to have been done feloniously. The court quashed the indictment; the attorney for the State excepted, and brings the case here by appeal.

1. The indictment, upon its face, is formal; the charging that the larceny was committed feloniously, will not vitiate it, although petit larceny is no felony by our statute. It is the punishment with us that makes the felony, and not the offence itself. All offences punishable by death or by confinement in

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the state penitentiary are felonies. Those punishable by fine or by imprisonment in the county jail, or by both fine and imprisonment in the county jail, are misdemeanors only. Petit larceny is a misdemeanor only, but it cannot vitiate the indictment to charge that the defendant feloniously did steal, take and carry away an article of personal property, the subject only of petit larceny. The use of the word "feloniously," therefore, in this indictment, did not vitiate it, nor did it afford any sufficient reason to quash the indictment.

2. But, nevertheless, the court did right to sustain the motion to quash this indictment. By our statute regulating the practice and proceedings in criminal cases, article 3, section 22, "no indictment for any trespass against the person or property of another, not amounting to felony, or for the first offence of petit larceny shall be preferred, unless the name of a prosecutor is endorsed as such thereon, except where the same is preferred upon the information or knowledge of two or more of the grand jury, or on the information of some public officer, in the necessary discharge of his duty; in which case a statement of the fact shall be made at the end of the indictment, and signed by the foreman of the grand jury." R. C. 1845, p. 866.

On this indictment, there is no name of a prosecutor, nor is there any statement endorsed thereon that the indictment was preferred on the information of two or more of the grand jury, or on the information of some public officer in the necessary discharge of his duty. The indictment, therefore, was properly quashed, and the judgment of the Circuit Court is affirmed, Judge Scott concurring.

THE STATE, Appellant, *vs.* HENKE & HENKE, Respondents.

1. Hiring a slave to maul rails, without the written consent of his master, is not a dealing with the slave, within the meaning of section 33 of the act concerning "slaves," (R. C. 1845.)

Appeal from Franklin Circuit Court.

H. A. Clover, for the State.

J. D. Stevenson, for respondent.

RYLAND, Judge, delivered the opinion of the court.

The defendants were indicted at the September term, 1852, of the Circuit Court of Franklin county, for dealing with a slave. The indictment charges that the defendants on, &c., at the county of Franklin, without the consent in writing of the master, owner or overseer, did then and there deal with a slave, to-wit, with Anderson, a negro man, belonging to Samuel Wilkinson, in this, in hiring said slave to maul rails, and did then and there pay said slave one dollar and eighty cents for said mauling of said rails, and without the consent in writing of the master, owner or overseer of said slave first had and obtained, contrary, &c. The indictment was, on the motion of the defendants, quashed, and the State brings the case here.

1. This indictment is founded on the following section of the act concerning "slaves." R. C. 1845, sec. 33, p. 1018. Sec. 33: "Any person who shall buy of, sell to, or receive from any slave, any commodity whatsoever, without the consent in writing of the master, owner or overseer of such slave first had and obtained, or who shall deal with any slave without such consent, shall forfeit to the master, owner or overseer of such slave, four times the value of the commodity so bought, sold or received, to be recovered by action of debt with costs, and shall also forfeit to the county in which the offence was committed, twenty dollars, to be recovered by indictment."

In the opinion of this court, the indictment was properly quashed by the court below. "The mauling of rails" charged therein, is not the commodity contemplated by the legislature, nor is it embraced by the statute.

The statute was obviously designed to prevent slaves from

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trading, selling or dealing in any commodity (that is, any thing movable that is bought and sold) with a person, without the master's permission, or that of the owner or overseer. It does not include the manual labor of the slave, however wrong it may be to hire or to induce a slave to work or labor for a person without the master or owner's knowledge and permission.

The legislature supposed, by prohibiting the dealing with slaves for any commodity, it would lessen the inducement to them for running about, leaving their master's premises, as well as to take away the temptation to pilfer, in order to carry on such traffic.

Nor is the mauling of rails such a dealing as is contemplated. So the indictment is defective. The judgment is therefore affirmed, Judge Scott concurring. Judge Gamble not sitting.

THE STATE, Respondent, *vs.* BARTON, Appellant.

1. Separation of jury in a criminal case no ground for a new trial, unless they have been tampered with. (*State v. Whitney*, 8 Mo. Rep. 165, affirmed.)
2. On the trial of A., who had been jointly indicted with B. for grand larceny, an intercepted letter addressed by A. to a person whom he called C., warning him to make his escape, *was held* admissible against A., without any proof identifying C. with B., there being other independent evidence that A. and B. committed the larceny.

Appeal from Pike Circuit Court.

Barton was jointly indicted with one Burke *alias* Ringold, for grand larceny, and on a separate trial was convicted. The evidence showed that the larceny was committed at Shaw's hotel, in the city of Louisiana. Franklin S. Torrey went to bed there on the night of August 9th, 1853, having about forty dollars in money in his pantaloons pocket, and a gold watch, which he placed under his pillow. The money consisted in part of two Mexican dollars and two five franc pieces. In the

morning, the money and watch were gone. On the previous evening, Torrey had been in company with Ringold at a grocery and had "treated," and had received in change some of the money of which he was robbed. On the morning after the robbery, Torrey met Barton and informed him of it. Barton said he had been robbed too, and had no money except one dime. Torrey caused Barton to be searched, when two five franc pieces and two Mexican dollars were found in one of his shoes. On the same day, Barton delivered to the mail agent, on board of the steamboat Die Vernon, a letter addressed to "J. J. Patterson, Alton, Illinois." This letter, which is set out in the opinion of the court, was offered in evidence, and to its admission, the defendant excepted. The statements of Barton, when he delivered the letter to the mail agent, also appear in the opinion of the court. There was evidence tending to show that Ringold left Louisiana in a skiff, during the night of August 9th, and went down the river towards Alton.

The following instructions, among others, were given at the instance of the defendant :

2. Unless the jury believe from the evidence, either that Barton stole the money and property, as charged in the indictment, or that Ringold committed the larceny, and that Barton was present, aiding and abetting in its commission, they must find Barton "not guilty."

4. If the jury shall believe from the evidence, that Burke *alias* Ringold, committed the larceny, as charged, and that the prisoner knew, before Burke committed said larceny, that he intended to commit it, and that it was understood between the prisoner and Burke that, after the larceny, the money and property was to be divided between them, and that on the next day, the prisoner aided Burke to escape, still the prisoner is not guilty, unless they find also that he was present, aiding and assisting in the commission of the larceny charged in the indictment, and they must find a verdict of not guilty.

5. In weighing and considering the evidence on the part of the prosecution, if the jury can account, in a reasonable man-

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ner, for every one or all the material facts, consistently with the innocence of the accused, it is their duty to acquit.

The following, asked by the defendant, was refused :

6. In order to connect Barton, in any manner, with Burke or Ringold, in the perpetration of the offence charged, it is necessary for the prosecution to prove that Burke or Ringold, mentioned in the indictment, is the same identical person who was concerned in the perpetration of said offence.

The jury found the defendant guilty. In support of the motion for a new trial, the defendant filed the affidavit of two of the jurors, to the effect that the jury had separated during the trial. The prosecuting attorney then filed the affidavit of the same two jurors, together with six others, that they had not conversed with any person other than themselves about the cause, during the trial. The motion for a new trial was overruled, and the defendant appealed.

Blennerhassett & Shreve, for appellant.

Clover and Hawkins, for the State.

RYLAND, Judge, delivered the opinion of the court.

The defendant was indicted with one Valentine Burke, otherwise called Ringold, for grand larceny, at the September term of the Circuit Court of Pike county, A. D. 1853. The defendant was tried and found guilty. He moved for a new trial, which being overruled, he appealed to this court. The appellant relies, for a reversal, upon the acts of the court below in admitting a letter to be read to the jury; in refusing to give the sixth instruction asked for by the appellant; and because the jury separated during the trial.

1. The affidavits upon the motion for a new trial, in regard to the separation of the jury, do not make a case calling for a new trial. This point is therefore ruled for the State. *State v. Whitney*, 8 Mo. Rep. 165.

2. As to the admission of the letter in evidence, there is no error, in our opinion, on this point. The defendant below, appellant here, said to a witness, that he had written to a man

by the name of Patterson, in Alton, a friend of his, to look out for the thief and arrest him ; he said that Patterson was a vigilant man, and he was sure he would arrest him. The witness then replied to Barton, that there were some things connected with that letter that perhaps he was not aware of ; that the letter he had written to Patterson had been opened by the mail agent on board the boat, and that, instead of containing directions to arrest the thief, it gave him warning to escape ; that four men were after him in a skiff, and that, if he did not look sharp, he would be arrested. Upon this he replied, " my God, this cannot be so ; there must be some mistake about it. I never wrote any such letter." John O. Roberts, a witness for the State, testified, that he was chief clerk on the steamer Die Vernon, running from St. Louis to Keokuk ; that he saw Dr. Barton (the defendant) on board the Die Vernon, on Wednesday evening, the 10th of August last ; he took passage for St. Louis ; heard him in conversation with the mail agent ; he paid his fare ; he handed a letter to Mr. White, the mail agent, on board the boat, saying he had written it to a friend of his in Alton, to arrest the thief ; that he had stolen a coat and perhaps something else from him (Barton.) This was before he took a room, and very soon after, some citizens of Louisiana came and asked for the boat to hold on a while, until they could get a writ for Barton. He then left the boat. Witness continued : " I looked at the letter whilst the agent had it, and told him we would examine it." Here a letter was produced, which, upon examination, witness stated was the same letter which Barton handed to the mail agent, while on board the Die Vernon, which letter was read in evidence, as follows : " Four men after you ; they suspicioned you ever since you have been here ; you will be taken if you don't look sharp ; there is a great excitement. I am going on the Die Vernon to day to St. Louis. I shall be in St. Louis to-morrow morning. Yours. Keep mum. Four followed you in a skiff. J. J. Patterson, Alton, Illinois."

The witness said, it was directed to J. J. Patterson, Alton,

Illinois, and was anonymous. Witness did not recollect whether it was dated. The letter was post-marked on board the boat, some time during the night, and deposited in the post office at Alton the next morning. I got the letter from the office at Alton, a few days ago, and brought it up with me. I marked the letter in the grand jury room by the direction of the grand jury. The letter was properly identified. Barton handed it to the mail agent, White; it was opened by the mail agent; the clerk of the steamboat knew it; he produced the letter before the grand jury; it was marked, and is, no doubt, the letter which Barton handed to the agent of the post-office to be mailed at Alton, to J. J. Patterson. Barton had stated to a witness that he had written to a man named Patterson at Alton, a vigilant man, to arrest the thief. Here was a letter which Barton handed to be left at Alton, to Patterson, and, though not signed, and though it contains no directions nor request to arrest the thief, it gives important information to his friend, Patterson, to look out; to avoid those in search of him. The letter was properly admitted. The man named Ringold or Burke, in Louisiana, may be Patterson in Alton. The letter says: "you have been suspicioned ever since you have been here." It is a fair presumption that the place was Louisiana; and it was addressed to his friend Patterson, who had been at Louisiana, though under the name of Burke or Ringold.

The instructions given by the court for the prisoner, as well as those for the State, contain a very full and fair exposition of the law arising on the facts in proof. Those for the defendant below are very favorable to him. The second, fourth and fifth were calculated to prevent the jury from coming to any improper conclusions against Barton. It seldom occurs to me to examine into a record of a criminal prosecution where the instructions more plainly point out and direct the jury under the law in regard to their verdict. The sixth instruction is the only one which was refused, and, in our opinion, this was properly refused. Barton was indicted as principal in the act of larceny as well as Ringold, alias Burke. Burke was not on

trial ; Barton was, and he could be convicted by proof showing his participation in the act, without naming Burke. It is not perceived what injury the refusal to give the sixth instruction could have possibly occasioned the defendant ; especially after the instructions already given. In our opinion, these instructions were enough ; they plainly and fairly put the case of the defendant, Barton, before the jury, and cautiously guide them in the way to reach a proper conclusion.

If there was no other testimony against Barton than the letter written to Patterson, who may be fairly presumed to be the Ringold or Burke who was in Louisiana, there would be some necessity to connect Ringold, to whom the letter may have been written, under the address of Patterson, with the person who committed the theft. But really we cannot see the propriety of this instruction, upon the case as made out. A witness proves that, about ten or eleven o'clock, at night, the night of the theft, Barton came to the bed where Ringold was asleep, and waked him up. He got up and they held a conversation, in a low tone, not understood by witness, then started out of the room and stopped a while. Ringold was gone some ten minutes and came back. Barton did not come back. Barton denies having any money ; he is searched, and four dollars, or rather two dollars and two five franc pieces found in his shoe. The person whose money was stolen swears he received that night, in change, two dollars and two five franc pieces. Why should an honest man carry four pieces of silver between the sole of his foot and his sock, in the village where he is residing ?

Upon the whole case, this court is of opinion, that there is no error in the court below, and its judgment must be affirmed, Judge Scott agreeing. Judge Gamble not sitting.

THE STATE, Appellant, vs. CHUNN, Respondent.

1. A party who sells a slave with a covenant of warranty of title, knowing that he has no title, is not guilty of such a false pretence as is indictable under the statute, (sec. 49, art. 3, act concerning crimes and punishments, R. C., 1845.)
2. An indictment which charges that money was obtained by *color* of a false pretence, is not sufficient. The word "*color*" in the statute only applies to the words "*false token or writing*," and not to the clause immediately following.

Appeal from St. Louis Criminal Court.

L. M. Shreve, for the State. The indictment describes an offence within the meaning of the statute. The defendant is criminally liable for falsely pretending that he owned the slave when he did not. *State v. Newell*, 1 Mo. 252. The fact that a *warranty* was given makes no difference.

N. Holmes, for respondent, on the point that no indictable offence was charged, cited 2 Russ. on Crimes, 303. Arch. Cr. Pl. 277. *Rex v. Codrington*, 1 C. & P. 661. 3 Arch. Cr. Pl. by Waterman, 470-1, 473 (note.) *Rex v. Pyrrrell*, 1 Stark. N. P. C. 402. The indictment is insufficient in not charging that the defendant obtained the money *by means* of the false pretence, instead of *by color* of the false pretence. 2 Russ. on Cr. 311. Archbold Cr. Pl. 275, 279.

RYLAND, Judge, delivered the opinion of the court.

The defendant, Chunn, was indicted at the May term, 1853, of the Criminal Court of St. Louis, for obtaining money from one Solomon P. Ketcham by false pretences.

The indictment charges the false pretence to be in the sale of a negro woman named Lucy, for \$600, which it charges that defendant sold to said Solomon P. Ketcham, falsely pretending that he, the said defendant, was the owner of said negro woman, and that he had full right and authority to sell her. The indictment sets forth the bill of sale for said negro

woman, executed by said defendant to said Ketcham, in which said defendant says: "I have sold to Solomon P. Ketcham my negro woman, Lucy, (slave for life,) for the sum of six hundred dollars, the receipt of which is hereby acknowledged. I do warrant and defend the title of said negro slave from the lawful claims of all persons whatsoever." The indictment negatives the ownership of said slave in said defendant, and denies that he had any property in said slave, or any right, power or authority to sell her, or to make any bill of sale for her to any person; and concludes thus: "All which the said William P. Chunn then and there well knew, and the grand jurors aforesaid, upon their oath aforesaid, do say, that the said William P. Chunn, then and there, in manner and form aforesaid, feloniously, deceitfully, designedly and by *color* of the false pretences and representations aforesaid, did get into his possession, and obtain from the said Solomon P. Ketcham, the sum of six hundred dollars," &c.

The defendant moved to quash this indictment, because it did not show a case of obtaining money under false pretences, within the true meaning and intent of the act in such case made and provided. The court sustained this motion, quashed the indictment, and the State brings the case here by appeal.

The only questions involved arise on the validity of the indictment. Is the transaction set forth in the indictment, such a false pretence as is embraced by our statute? And is the indictment sufficient on its face?

The 49th section of art. 3 of the act concerning crimes and punishments, R. C. 1845, p. 363, declares that, "Every person who, with intent to cheat or defraud another, shall, designedly, by *color* of any false token or writing, or by any other false pretence, obtain the signature of any person to any written instrument, or obtain from any person any money, personal property, right in action, or other valuable thing or effects, whatsoever, upon conviction thereof, shall be punished in the same manner, and to the same extent, as for feloniously stealing the money, property or thing so obtained."

This statute has provisions very similar to the British statute of Henry VIII, ch. 1, and of 30 Geo. II, chap. 24. The first one of these statutes uses the words "by color and means of any such false token or counterfeit letter," &c. It has been held, that this statute of 33 Henry VIII, ch. 1, required a false seal or token to be used, in order to bring the person imposed upon in the confidence of the other, and this statute being found too narrow and insufficient, the statute 30 Geo. II, ch. 24, was enacted. The words of this are very general: "All persons who, knowingly, by false pretences, shall obtain from any person money, goods, &c., with intent to cheat or defraud," &c. Justice Buller said, in the case of *Young and others against The King*, in error, 3 T. R. 98, "that the ingredients of this offence are the obtaining money by false pretences, and with an intent to defraud. Some pretence must be used and that pretence false."

In the case of the *King v. Codrington*, 1 Carrington & Payne, 661, (also in Eng. Com. L. R. 518,) the indictment was for obtaining money by false pretences. It charged that the defendant obtained the sum of £29 3s. by falsely pretending to a person named Varlow, that he was entitled to a reversionary interest in the one-seventh share of a sum of money left by his grand-father, whose name was Wickes; whereas, in fact, he was not entitled to any interest in any share, &c., negating the pretences. Plea, not guilty. It was stated, in opening, that the defendant pretended that he was entitled to the reversionary interest mentioned in the indictment, and thereby induced Varlow, the prosecutor, to purchase it on the 22d December, 1824, at the price of £29 3s.—the defendant having, in fact, sold all his interest in it to a person named Pick, on the 18th September, 1824. To prove the pretence, a deed dated December 22, 1824, assigning the defendant's interest in his one-seventh share of the money to Varlow, was put in, and *in this deed, there was the usual covenant for title*. The prisoner's counsel objected that this deed was no evidence of any false pretence, for if it was, every breach of every cove-

nant would be indictable. Littledale, Justice, said: "Certainly a covenant in a deed cannot be taken to be a false pretence. The prosecutor was then called, and he proved that defendant asked him to purchase a seventh share of some money that he would be entitled to under his grandfather's will, on the death of one of his relatives, and that he agreed to purchase it, and got a deed of assignment executed to him, and he thereupon paid the purchase money. To prove the falsehood of the pretence, the previous assignment by the defendant to Pick was put in. The counsel for the prisoner objected that the prosecutor did not advance the money in consequence of the verbal pretence used by the defendant, but took the covenant as his security. What passed between the parties by parol, was afterwards embodied in the deed; it was a mere breach of covenant. For the prosecution it was contended, that the indictment charges that the defendant obtained the money by pretending that he was entitled to this reversionary interest. That pretence was proved to be false, and yet it is to be contended that, because he reiterated that pretence in a deed, it becomes no offence. In reply, the counsel for the defendant observed: "It is not every thing which is untruly stated at the time of a bargain, which is an indictable pretence." Littledale, J., said: "The doctrine contended for, on the part of the prosecution, would make every breach of warranty or false assertion, at the time of a bargain, a transportable offence. Here the party bought the property, and took as his security a covenant that the vendor had a good title. If he now finds that the vendor has not a good title, he must resort to the covenant. This is only a ground for a civil action." See also *Rex v. Pyrrell et al.*, 1 Stark. R. 402.

In the opinion of this court, the false warranty in the sale of the negro woman, is not such a fraudulent pretence as was contemplated by our legislature. The purchaser must resort to his civil action for the breach of that warranty. The pretence with a warranty is not a criminal false pretence. So much, then, for the transaction set forth in the indictment.

State v. Thevenin.

As to the form of the indictment, the manner in which the money was obtained is not sufficiently charged under our statute. The indictment does not charge that the money was obtained by a false pretence, "but by color of a false pretence," &c. This is not sufficient. By reference to the statute, the section above quoted, it will be seen that the color therein mentioned is in regard to the use of a false token or writing; it does not apply to the other clause of the section. The "or by any other false pretence" is a distinctive method in which the fraud may be perpetrated; not "by color of any other false pretence," but "by any other false pretence."

In the opinion of this court, the indictment is not sufficient, and the judgment of the court below, in quashing the same, is affirmed; the other judges concurring.

THE STATE, Respondent, vs. THEVENIN, Appellant.

1. If a party appealing from a conviction before a justice for an assault and battery, fails to prosecute his appeal, the judgment is properly affirmed.

Appeal from St. Louis Criminal Court.

A. P. & P. B. Garesché, for appellant.

H. A. Clover, for the State.

RYLAND, Judge, delivered the opinion of the court.

Thevenin was arrested and tried before a justice of the peace, Mann Butler, Esq., for an assault and battery, charged to have been committed by him on Charles Dwyer. He was found guilty by the jury, who assessed his fine at one dollar. From this judgment, Thevenin appealed to the Criminal Court. When this case was called in the Criminal Court, it was continued on account of the absence of a material witness on the part of the State. This continuance was had on the 13th May, 1853.

Afterwards, on the 14th July, 1853, the case was called; the circuit attorney appeared for the State, the defendant did not appear, but made default. Thereupon, on motion of the circuit attorney, it was considered by the court that the judgment of the court below be, in all things, affirmed. The defendant afterwards filed his motion and affidavit to set aside this judgment, which motion was overruled. The defendant excepted, and brings the case here by appeal.

1. The statute concerning justices' courts, breaches of the peace (R. C. 1845, p. 675, sec. 22) declares: "In all cases not specially provided for in this act, the process and proceedings before the justice shall be governed by the laws regulating proceedings in justices' courts in civil cases. By the 20th section, it is declared that, if the judgment of the justice be affirmed, &c., the judgment shall be rendered against defendant and his securities. By the 16th section of the statute concerning costs, (art. 1, R. C. 1845, p. 244,) we find: "In all cases, when an appeal from a judgment of the county court or of a justice of the peace shall not be prosecuted by the appellant according to law, the judgment shall be affirmed, and the costs adjudged accordingly."

This is the rule of proceedings in civil cases. This rule is applicable under the statute to cases of breaches of the peace. The Criminal Court, therefore, was fully authorized to affirm the judgment of the justice of the peace in this case. This court will not interfere with the discretionary power of the Criminal Court, exercised in overruling the motion to set aside the judgment of affirmance. We find no error in the Criminal Court, in overruling this motion. The affidavit in support of the motion did not authorize the court to set aside the judgment. In the opinion of this court, the judgment of the Criminal Court was correct, and the same is affirmed, with the concurrence of the other judges.

State v. McBride.

THE STATE, Respondent, vs. McBRIDE, Appellant.

1. A verdict in a criminal case which incorrectly states the name of the party indicted, will not support a judgment.
2. Such a mistake cannot be amended after the separation of the jury.
3. It is not a presumption of law that every one present at a riot, and not actually aiding in the suppression, is guilty, unless he proves his non-interference.

*Appeal from St. Louis Criminal Court.**Blennerhassett & Shreve*, for appellant.*H. A. Clover*, for the State.

RYLAND, Judge, delivered the opinion of the court.

The defendant, Joseph McBride, was indicted with several others for a riot, in St. Louis county. The jury found several of the persons indicted guilty, and found *James* McBride guilty and assessed his fine at twenty-five dollars. Joseph McBride made his motion for a new trial, which was overruled. He also moved in arrest of judgment, which was overruled. He then moved to be discharged, because the jury returned no verdict against him, which was likewise overruled, and he brings the case here by appeal.

1. The verdict of the jury is, that James McBride is guilty. James McBride was not indicted; Joseph McBride was indicted. He was the person who pleaded not guilty, and the issue was pending between the State and him. The verdict did not respond to this issue. "Every verdict, so far as it is contrary to matter of record, is bad." *Bac. Abr. tit. Verdict (T.)* The State charges a criminal act upon Joseph; he puts in issue this charge, and the jury found that James did the act. This finding will not support a judgment against Joseph. The verdict is against what the State alleges on the record; it is bad. It cannot authorize a judgment against James, because he is not indicted; it will not support a judgment against Joseph, because it does not find him guilty.

2. In the case of *Little v. Larrabee*, 2 Greenl. 38, Mellen, C. J., said: "There are two classes of cases found in the books respecting erroneous and defective verdicts. The first class contains those cases in which the incorrectness or defectiveness of the verdict or error in the record of the judgment consists in something merely formal, and which has no connection with the *merits of the cause*; where the amendment, when made, in no respect impairs or changes the rights of the parties, but may only prevent the disturbance of the proceedings by writ of error, or by correcting clerical mistakes, render the record consistent and the verdict pursuant to the issue; he then refers to numerous cases.

The second class contains those cases where error has been committed by *the jury*, either by returning a verdict against the wrong party, or, if not so, for a larger or smaller sum than they intended, and those where, if the amendment or alteration should be made, and the damage should be increased or diminished, or the verdict reversed, the rights of the parties would be immediately affected and changed, and this too, after the jury had, by their separation, become accessible to the parties and subject to their influence; and he cites many cases. In this last class, there can be no amendment; the remedy is, to set aside the verdict. This is the law in civil cases, in which amendments are allowed liberally; but this doctrine of amendments does not extend to criminal cases. Upon this point, then, this judgment must be reversed.

3. The instruction given to the jury by the court, in which it is laid down as law, "That, in riotous and tumultuous assemblies, all who are present and not actually assisting in the suppression in the first instance, are, in presumption of law, participants, and the obligation is cast upon a person so circumstanced to prove his non-interference, is erroneous. Such is not the law. The judgment of the Criminal Court is reversed, the other judges concurring.

State v. Anderson.

THE STATE, Respondent, vs. ANDERSON, Appellant.

1. The bad character of the parents of the prosecutrix is not admissible evidence in behalf of a party charged with rape.
2. At the trial of a negro upon an indictment for an attempt to ravish a white female, the jury is at liberty to find that the averments of the indictment as to color or race and sex are sustained, from seeing the parties in court, and proof that the defendant is a slave.
3. An indictment of a *negro* for an attempted rape is properly framed upon the first clause of the 31st section of the 2d article of the act concerning crimes and punishments, (R. C. 1845,) without reference to the 26th or 37th sections, which are only applicable to rapes and attempted rapes by *white persons*.
4. Neither a civil nor a criminal case will be reversed merely because the verdict was against the weight of evidence.
5. Jurors are the exclusive judges of the weight of testimony. They are not obliged to reject all the testimony of a witness who has testified falsely in one particular.

Appeal from St. Louis Criminal Court.

Anderson, a negro slave, was indicted for an attempted rape upon a white female. The indictment contained two counts. The second, upon which alone the defendant was convicted, was as follows: "And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that John Anderson, a negro man slave, on, &c., at &c., in and upon one Rebecca Ann H., a white female, in the peace of the state, then and there being, violently and feloniously did make an assault, and her, the said Rebecca Ann did then and there attempt, forcibly and against her will, to ravish, and carnally know, against the peace and dignity of the state."

At the trial, the prosecutrix was called as a witness for the State. Other witnesses were also called, and there was evidence tending to sustain the charge of an attempted rape. At the close of the testimony for the prosecution, it had been proved that the defendant was a slave, but no witness had testified that he was a negro man, or that the prosecutrix was a white female.

Two negroes were called as witnesses by the defendant. The State objected to the competency of these witnesses, on the ground that they were negroes, and one of them was a slave. The objection was overruled, and an exception taken. The defendant's counsel put to one of these witnesses the following questions, to which an objection was sustained: "Do you know what the girl's people did for a living?" "Do you know what the girl's mother did for a living?"

The following instructions, among others, were given by the court:

"If the jury believe, from seeing the witness, Rebecca, in court, upon the witness stand, that she is a white female, or from seeing the defendant in court, or from the testimony of his being a slave, that he is a negro, these facts are sufficient to support the allegation in the indictment in relation to the color, sex and race of the prosecuting witness and the defendant."

"If the jury believe from the evidence, that the defendant is guilty of an attempt to commit a rape, as charged in the second count of the indictment, you cannot acquit the defendant, because you may believe the witness, Rebecca, is of bad character for virtue, or that she associated with negroes."

"If the jury believe that the witness, Rebecca Ann, has testified falsely to any material matter in this cause, the jury, in such case, ought to reject the whole of her testimony and acquit the prisoner."

Several instructions were asked on behalf of the defendant, which were refused. The jury returned a verdict of "guilty" upon the second count of the indictment. The defendant moved for a new trial and in arrest of judgment. These motions being overruled, he was sentenced to be castrated, and now appeals to this court.

Lackland & Jamison and *G. W. Cline*, for appellant, among others, made the following points: 1. The question as to the competency of the negro testimony, introduced by the defendant, does not arise, as the State does not appeal. The

testimony, however, was admissible. If the defendant was a negro, it is settled by the 22d section of act concerning witnesses (R. C. 1845.) If he was a white man, still it was admissible in his favor, or else the operation of the statute is to abridge the rights and privileges of the white man. 2. The testimony as to the character of the parents of the prosecutrix should have been admitted. The manner in which she was educated, and the influences by which she was surrounded, were material upon the question of her character and credibility. *Camp v. State*, 3 Kelly, 420. 3. The averments in the indictment, that the prosecutrix was a white female, and the defendant a negro, were material and had to be proved. *Nathan v. State*, 8 Mo. Rep. 631. *Grandison v. State*, 2 Humph. 452. *Elijah v. State*, ib. The court erred in telling the jury they might find that the prosecutrix was a white female, from seeing her on the witness stand, and that the defendant was a negro, from seeing him in court, and proof that he was a slave. If this be law, then it would be proper in a larceny case to instruct the jury that they might find the material fact of value from seeing the article, or in a case of passing counterfeit money, that the money was counterfeit or genuine from seeing it in court. This is in effect telling the jury that they may find material facts from their own individual knowledge, without being subjected to cross-examination. Under the statute, the question before the jury was not merely one of *color*, but of *race*. Such questions are often of the greatest difficulty, requiring for their solution scientific skill. There are albinos, mulattoes and quadroons, who excel Caucasians in whiteness of skin. Yet, before the jury could convict the defendant, it was necessary that they should find that he was a negro, and the prosecutrix a Caucasian. These facts they could only find upon proof. *Dunbar v. Parks*, 2 Tyler, 217. *State v. Powell*, 2 Halst. 244. 1 Starkie's Ev. 543. *Clark v. Robinson*, 5 B. Monroe, 55. *Burrows v. Anderson*, Cox, 203. Gilpin, 260. 2 Humph. 455. Ib. 452. *McGuire v. State*, 13 S. & M. 257. Slavery does not raise the legal pre-

sumption of black color, although the converse is true. *Indians* are held in slavery in many of the states of the Union. *State v. Wagner*, 1 Halst. 374. *Deck v. Coleman*, 1 Wash. 233. 2 Mo. 69-71. If there was any such presumption in any case, it would be overcome, in a criminal case, by the paramount presumption of innocence. 3 Starkie's Ev. 895. 2 B. & Ald. 386. 4. The indictment is not sufficient. It is drawn upon the first subdivision of the 31st section of the second article of the act concerning crimes and punishments, as though this subdivision alone described an offence, whereas, it only sets forth facts making a compound offence of the one described in the latter clause of §26 and §37 of the same article, and prescribes a different punishment therefor. The offence which should have been charged was, an assault *with intent* to commit a rape, as described in §37, by forcibly ravishing, as mentioned in the latter clause of §26, under the additional circumstances of the prosecutrix being a white female, and the defendant being a negro or mulatto. A general charge of *an attempt* to commit a rape no more describes an offence than would a general charge of violating the statute, which is not sufficient. *Kliffield v. State*, 4 How. (Miss.) 306. 3 Blackf. 29. Hale P. C. 229, §68. Bac. Abr. 570. 1 Chitty's Crim. Law 232. *Anthony v. State*, 13 S. & M. 263. *State v. Gatewood*, 4 Ohio, 386. Breese, 197. 1 English, 519. 5. The punishment which the statute affixes to the offence of which the defendant was convicted, is unconstitutional, being "cruel and unusual."

H. A. Clover, for the State, among other points, argued the following: 1. The indictment followed the language of the 31st section upon which it was framed, and was sufficient. It was not necessary to allege the *manner* in which the attempt to ravish was made, nor that the defendant assaulted *with intent* to ravish. In the case of a negro, the statute makes the offence to consist in the *attempt* to commit a rape. The 34th and 37th sections, which speak of an assault *with intent* to ravish, describe the same offence when committed by white per-

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sons. 3 Gill & J. 8. 4 Hill, 133. 8 Humph. 585. 3 Eng. 400. 2. The court correctly told the jury that they might find the color of the parties from seeing them in court, and proof that the defendant was a slave. Where no question was made as to whether the prosecutrix was of mixed blood or not, it was merely idle to call a witness to tell the jury *from inspection* that the prosecutrix, who had testified before them, was white, which the witness would have no better means of knowing than the jurymen themselves. The instruction upon this point was founded upon reason and common sense. There may be cases where it would be necessary to prove color, as where the prosecutrix was dead or absent. 4 Humph. 272. 2 Humph. 456. 3. The constitution was only made for citizens, which the defendant is not.

SCOTT, Judge, delivered the opinion of the court.

Anderson, a slave, was indicted for an attempt to ravish a white female over ten years of age, in St. Louis county, of the name of Rebecca Ann Hewett. The indictment, after the usual beginning, charges that Anderson, in and upon the said Rebecca, violently and feloniously did make an assault, and her, the said Rebecca Ann Hewett, did then and there attempt forcibly and against her will to ravish and carnally know.

1. On a trial, the defendant was convicted. The following questions were asked: "Do you know what the girl's people did for a living? Do you know what the girl's mother did for a living?" The State objected to these questions, and they were ruled out, and exceptions were taken.

We see no error in this action of the court. A child's teeth shall not be set on edge because its father has eaten sour grapes.

2. As the prosecutrix had appeared as a witness before the jury, and as the defendant was in court and arraigned in the presence of the jurors, and as it had been proved that he was a slave, there was no error in telling the jury that, from these

circumstances, they might find that the prosecutrix was a white female and the defendant a negro.

3. It was proper to frame the indictment under the first clause of the 31st section of the second article of the act concerning crimes and punishments. That section alone related to rapes and attempted rapes by negroes and mulattoes. The 37th section of the same article relates to assaults, the punishment for which is not hereinbefore prescribed. As the punishment for the offence charged in the indictment had been prescribed by the 31st section, that crime was not embraced in the 37th section. It is only necessary to read the article to be satisfied that the 37th section has nothing to do with attempts to commit rapes by negroes. Many offences had been enumerated, and no provision had been made for the punishment of attempts to commit them. This section was intended to supply those omissions. Provision had been made for punishing attempts by negroes to commit rapes, therefore such offences by them are not within the section.

4. Many reasons were urged to show that the verdict in this case should be set aside. We know no distinction between civil and criminal cases. When the verdict of a jury comes here endorsed by the refusal of the court which tried the cause to grant a new trial, this court will not interfere on the ground that the evidence does not support the verdict. Jurors are the appropriate judges of the facts, as the courts are of the law.

5. It would be useless to review each instruction that was given and refused. Such a course would be of little or no advantage in future trials, as the points of the instructions turn mostly on their phraseology and involve no principle. Some of them are mere comments on the evidence, or charges to the jury as to matters of fact, which the law forbids being given without the consent of both parties. R. C. 882, section 28. What is striking in the instructions is, the attempt of the court to prescribe rules to the jury by which they were to ascertain the credit due to a witness. When a witness testifies to jurors, they are the exclusive judges of the weight to be

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given to his testimony. The rule, *falsus in uno, falsus in omnibus*, has little to do with jury trials. It was adopted in chancery, where causes are heard on depositions, but we see no necessity for its application to jury trials, where the witnesses are present and are seen and heard by the jurors. No jury qualified for the trust would convict on the uncorroborated evidence of witnesses, who, they believed, had wilfully sworn to a falsehood. The defendant was not prejudiced by any instruction of the kind alluded to, given by the court.

The other judges concurring, the judgment will be affirmed.

THE STATE, Respondent, vs. GRESSER, Appellant.

1. There can be no larceny without a felonious intent.

Appeal from St. Louis Criminal Court.

Gresser was indicted for grand larceny, for stealing a cow, of the value of twenty dollars. The owner of the cow testified that he turned her out to graze upon the commons, and two or three days afterwards found her dead and partly cut up near the soap factory of one Kohler. Information derived from Kohler led him to go to the defendant and accuse him of stealing the cow. Defendant denied the theft, saying that he found the cow dead near Chouteau's pond, and helped to put her on a dray to be removed. Being further pressed upon the subject, he said he could not understand English. Kohler testified that the cow was brought upon a dray by two men, to the spot where she was found. After the two men with the dray had reached the spot, defendant came up and assisted them to take the carcass off the dray. Defendant asked witness if he did not want a dead cow, to which he replied that he did not. Defendant then went away. He did not come nor go away with the other two men. The drayman testified

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that he was employed by a man to haul the cow from near Chouteau's pond, where she was lying dead, over on to the commons. He was not employed by the defendant. While they were putting the carcass on the dray, the defendant came along and assisted them. The cow had been dead so long as to smell very offensively. After they reached the spot where the cow was to be left, the defendant came up again and assisted in removing her from the dray. Defendant went away before witness and the other man. Witness went away and left the man who employed him with the carcass.

The defendant asked the court to direct the jury that they must acquit, if they believed that the defendant, without converting the cow to his own use, assisted in removing her from a neighborhood where she was becoming a nuisance; also that they must acquit, if the cow was not removed by the defendant and others, with the felonious intent of converting her to their own use.

These instructions were refused, and the court, of its own motion, gave several instructions. The defendant was found guilty of petit larceny, and after an unsuccessful motion for a new trial, appealed to this court.

Cline & Thompson, for appellant.

H. A. Clover, for the State.

RYLAND, Judge. From the statement of the facts in evidence in this case, it will at once be seen, that the instructions prayed for, on the part of the defendant, should have been given. These instructions became proper and necessary, especially after those given by the court for the State.

In looking into the evidence, as preserved by the bill of exceptions, the mind of one accustomed to judicial proceedings, especially in criminal cases, becomes somewhat at a loss to account for the conviction of this defendant. We have not yet reached the era in the administration of criminal law, in which it becomes necessary only to *accuse* in order to *convict*. Some proof of *guilt* is still required.

State v. McCann.

In this case, the Criminal Court should have granted a new trial at once, for there is scarcely a pretence for the conviction. The judgment is reversed, the other judges concurring.

THE STATE, Respondent, *vs.* McCANN, Appellant.

1. A purse accidentally left in a store is not lost, and a party who takes it with a felonious intent is guilty of larceny.

Appeal from St. Louis Criminal Court.

Lewis & Henning, for appellant.

H. A. Clover, for the State.

RYLAND, Judge, delivered the opinion of the court.

The defendant was indicted at the January term, 1853, of the Criminal Court of St. Louis county, for grand larceny. At the March term following, he was tried and found guilty, and his punishment assessed at two years imprisonment in the state penitentiary. He moved for a new trial, which was overruled, and he excepted. He also moved in arrest of judgment, which being overruled, he likewise excepted to that, and brought the case here by appeal.

The testimony preserved in the bill of exceptions shows that the money charged to have been stolen was the property of William Eatherton, as charged in the indictment; that Eatherton, on the Friday before last Christmas, was trading in a store in St. Louis county, purchasing some articles; that he laid his purse down on the counter, and went out of the store, and in a few minutes felt his pockets and found that he had lost his purse. He returned to the store and ascertained which way the defendant started; and re, the said Eatherton, and a neighbor or two of his, put off after the defendant; that when he was trading in the store and had his purse, the defendant was pre-

sent in the store. When Eatherton overtook the defendant on the road, he stopped, and the defendant also stopped, and defendant asked Eatherton, "Are you the man that lost the purse?" Eatherton said, he had lost his purse; the defendant then put his hand into the breast of his coat and pulled out \$7 80 of Eatherton's money, wrapped up in a kind of rag, and gave it to him. Defendant was asked where the purse was; he would not answer—would not state where it was. He said the purse was not worth carrying; he had taken the money out of the purse and thrown the purse away. There was more money in the purse than was handed over by the defendant. Eatherton stated, that there was no other person in the store when he first went in, but that defendant and two others came in afterwards, and were in the store when he left. Eatherton says he left his purse on the counter. The store belonged to Daniel Andrews. Mr. Andrews was behind the counter; says he does not know exactly how much money there was in the purse; there were ten dollars of paper money in the purse, which he had got from a neighbor in exchange for an eagle, and some other paper besides, and some silver, three two dollar bills, five franc piece, a fifty cent piece and some five and ten cent pieces; says that, during that morning, he spent but twenty cents out of the purse; says that the first thing said when he overtook the defendant on the road was, "are you the man that lost the purse?" He said he was. Eatherton also says there were no marks nor names about the purse by which any one could have told to whom it belonged. This is about the substance of the testimony. The defendant offered none.

The court instructed the jury that, if they believed from the evidence, that the defendant, either by himself, or with others, did steal, take and carry away the money of the defendant, as charged in the indictment, and that the value of said money so stolen was of the value of ten dollars or upwards, and that the defendant, either by himself or with others, stole the money, with the intent to convert it to his own use, and that he did so steal within three years next before the finding of this indict-

ment, and in St. Louis county, they will find the defendant guilty of grand larceny.

Without the jury believe from the evidence, that the defendant took the money with the intent to steal it, or aided and abetted any other person or persons, with the intent to steal, they will find the defendant not guilty. The court also instructed the jury about the time of imprisonment for grand larceny, and about the reasonable doubt, which instructions are thought not necessary to be noticed.

The defendant excepted to the instructions given by the court, and moved for the following :

"If the jury believe that the money was lost, and found by the defendant, they cannot find the defendant guilty, unless the evidence satisfies them that the defendant knew to whom the money belonged, or that the purse or vessel containing the money was so marked, obviously and clearly to show to whom the money belonged." The court gave this instruction, but added the following : "But if the jury believe from the evidence, that the money was left on the counter, and the defendant knew it, and that he took the money, or aided any other person or persons in taking it, with the intent to steal it, in that case you will find the defendant guilty."

The court refused the following instructions :

"If the money was lost and found by the defendant, the jury cannot find him guilty, unless they are satisfied, beyond a rational doubt, that, at the time he converted the money to his own use, he knew to whom the money belonged. If the defendant did not know to whom it belonged, at the time he converted it to his own use, the jury must acquit."

"The fact that the money was found in the possession of the defendant, will not of itself be sufficient to sustain the charge of a felonious taking, so that the defendant can be found guilty of larceny."

The defendant excepted to the refusal to give these instructions to the jury.

1. This case differs widely in its important facts from the case

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of the *State v. Conway et al.*, decided at the last term of this court, (the Glencoe safe case.) Here, a man leaves his purse on the counter of a store, in the presence of the defendant; in a few minutes search is made for it; he starts off after the defendant, and when he overtakes him, the defendant says first, before any thing else is spoken, "Are you the man who lost the purse?" and when answered in the affirmative, he put his hand in the breast of his coat, and pulls out the money which had been taken from the purse and wrapped in a rag, and hands to the owner \$7 80. The counsel for the prisoner seems to rest the whole force of the defence upon the words used, and the answer given to this first question: "Are you the man who lost the purse?" "Yes, I lost mine." From this expression "lost," he concludes that the money was lost in reality; he loses sight of the facts of the case, and takes it for granted the money was lost. The purse was lost, and being unmarked, the owner could not be known, and larceny could not be committed. Now the leaving the purse, in this case, on the counter, in the presence of the defendant, was not such a losing of it as is contemplated in the cases cited by this court in the *Glencoe safe case.* It matters not if the defendant did not know the man's name to whom the purse belonged, if he saw the man put the purse on the counter and leave it. He knew who put it there and who left it. It was not, in reality, so lost that larceny could not be charged against the finder, who saw the owner leave it.

The instructions put the law of the case very fairly before the jury, especially the one asked by defendant's counsel, and given with an additional explanation by the court, and the court did very right to reject the other two. Instructions should be always based upon the facts and the law arising thereon in every case, and should be so drawn as to assist the jury in forming a just and proper conclusion upon the evidence before them.

It will not always answer to give instructions, though drawn in the very phraseology of judicial determination. Instruc-

tions must have some relation to the facts in proof. Abstract propositions should always be refused ; and this court will not reverse for not giving instructions, wherever we see that proper instructions, embracing the law of the case, have been given.

The cases cited by the defendant's counsel, differ, in facts, from the one now before us. The cases of the *People v. Anderson*, 14 John. 294, and *People v. Cogdell*, 1 Hill, 94, and the cases in *Yerger* are cited and commented on by this court, in the case of the *State v. Conway et al.*, last term. The doctrine of the Tennessee courts is repudiated. The cases of *The People v. McGarren*, 17 Wend. 460 ; *Regina v. Peters*, 1 Carrington & Kir. 47 Eng. Com. L. R. 245 ; *State v. Ferguson*, 2 McMullan, 502 ; *Regina v. Rebecca Kerr*, 8 Car. & Payne, 176, (34 Eng. Com. L. R. 341 ;) *State v. Weston et al.*, 9 Conn. 527, are authorities bearing directly on the case now before us, and are strong against the position taken by defendant's counsel, and in favor of the ruling of the court below.

The case in *Wendell* is similar to this : the defendant, McGarren, was indicted for petit larceny, in stealing a whip worth two dollars, the property of one Stephen Northrop. The defendant was a merchant in Utica, and Northrop came to his store to buy cloth. After spending some time in looking at cloths, he went off without making a purchase, leaving his whip in the store, and the defendant concealed it. Within a few minutes, Northrop returned and enquired for it, and was told by the defendant that he had not seen it. Northrop returned repeatedly during the day, and always received the same answer. It was given in evidence that, when Northrop left the store, defendant expressed his dissatisfaction that he had not made a purchase, but observed, he has left his whip and I will keep it, and, accordingly, put it away ; that previous to Northrop's return, the last time, the defendant had found out that he had purchased cloth elsewhere, and he then told Northrop, if he had bought the cloth of him, he would not have lost his whip. It was also in proof that, after Northrop left, the last time, the

State v. Lopez.

defendant told his clerk, if Northrop called again, to give him his whip. It was also stated that the defendant said he intended to return the whip. The court charged the jury that the whip, though left in the defendant's store, was not so in the defendant's possession, as not to be the subject of larceny by him, but was, in contemplation of law, in the possession of the owner, and not lost, and that a larceny of it could be committed by the defendant or any one else; and if they believed that the defendant took the whip from the place where it was laid by the owner, with the intention of appropriating it to his own use and defrauding the owner, they should find the defendant guilty. The jury convicted the defendant and he was fined seventy-five dollars. He excepted to the decision of the court and the charge to the jury, and sued out his writ of error. This was affirmed in the Supreme Court. I have examined the numerous cases on this doctrine, and could cite others, but it is deemed unnecessary. The weight of authority is against considering property situated as the purse of Eatherton was, in this case, so lost that larceny could not be committed of it. The indictment is considered sufficient, and the motion in arrest properly overruled. The judgment of the Criminal Court is therefore affirmed, with the consent of the other judges.

THE STATE, Respondent, vs. LOPEZ, Appellant.

1. An indictment which does not conclude "against the peace and dignity of the state" is bad.
2. A circuit attorney can make no agreement which will discharge a criminal from responsibility for an offence.
3. A circuit attorney, in open court, agreed with a defendant, against whom several indictments were pending, that, if he would plead guilty as to some, he should be discharged from the others. The defendant accordingly pleaded guilty to four of the indictments, and a *nol. pros.*, in the ordinary form, was entered on the record as to the remainder. Held, the entry of a *nol. pros.* could not be held to have the legal effect of a *retrazit*, by reason of the agreement.

Appeal from St. Louis Criminal Court.

Indictment for embezzlement. The indictment concluded "against the peace of the *statute* and of the statute in such case made and provided." The defendant filed a plea of "not guilty," and two special pleas in bar. The first special plea in bar is sufficiently stated in the opinion of the court. A demurrer to this plea was sustained. The second plea was in the form of a plea of former conviction or acquittal, and stated that the defendant had formerly pleaded guilty to an indictment for the same offence charged in this indictment, and had received judgment and pardon. Upon this plea, issue was taken, and it was found against the defendant. He was found guilty and sentenced, and after an unsuccessful motion for a new trial, appealed to this court.

Lackland & Jamison, Cline & Thompson, for appellant.
H. A. Clover, for the State.

GAMBLE, Judge, delivered the opinion of the court.

1. The indictment in this case does not conclude "against the peace and dignity of the state," as is required in the constitution. It concludes thus: "against the peace of the statute and the statute in such case made and provided." The judgment for this cause must be reversed.

2. We have been asked to express an opinion on the plea in bar of the defendant, in which he sets up an agreement made by him with the circuit attorney, at a term of the Criminal Court, when there were ten indictments pending against him for embezzlement, by which agreement it was stipulated that the defendant should plead guilty upon four of the indictments, and that the state should enter a *nolle prosequi* on the other six, and discharge him from all liability to answer them. Under this agreement, he pleaded guilty on the four, was sentenced and pardoned, and a *nolle prosequi* was entered on each of the other six. The plea alleges that the offence charged in the

present indictment is the same with that charged in the four on which he pleaded guilty, was sentenced and pardoned, and alleges his identity. The State demurred to the plea, and the demurrer was sustained.

We recognize no authority in the circuit attorney to make an agreement by which any criminal shall be discharged from the claims of justice. The chief executive of the state alone can exercise the power of pardon. If a record was made in the Criminal Court, which would have the legal effect of discharging the defendant from responsibility for the six offences for which the indictments were found, upon which a *nol. pros.* was entered, such record would have its effect here; as if there had been a plea of guilty, and the smallest punishment allowed by law had been imposed; but if no entry of record has the effect of discharging the defendant, he cannot plead the agreement between himself and the circuit attorney as a discharge. If such agreement can be recognized any where, it must be by the executive, on an application for pardon, and with the executive it might very properly, in many cases, have very great weight.

3. It has been said that the *nolle prosequi* entered in the cases should be regarded as a *retraxit*. But we do not feel authorized to say that the entry on the record can have any greater legal effect in discharging the defendant from future prosecution, because of the supposed agreement, than it would have without such agreement. In other words, the operation of the entry made on the record can only be determined by its own terms. In the present case, the plea states nothing more than a *nolle prosequi* in the ordinary form.

The judgment, because of the defect of the indictment, is reversed, with the concurrence of the other judges.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF MISSOURI,
JANUARY TERM, 1854, AT JEFFERSON CITY.

THE COUNTY OF COOPER, Respondent, *vs.* GEYER, Appellant.

1. An appeal lies from the order of a county court changing a road, in favor of a party whose land is taken, and in the present case, the county was held to have been properly made a party to the proceeding.
2. Under the 20th section of the first article of the act for opening and repairing roads and highways, approved March 26th, 1845, a county court has no right to turn a road on another's land against his consent. That section is not repealed by the act of January 25th, 1847.
3. In opening new roads, the land of individuals who do not consent, can only be condemned in the mode prescribed by the 7th, 8th, 9th and 10th sections of the act of March 3d, 1851.

Appeal from Cooper Circuit Court.

This was a proceeding in the Cooper county court to change the location of a specified part of a county road leading from Boonville to Pisgah. The proceeding originated in a petition of Gilbert Reeves and others, which specified the part of the road sought to be changed, and the private convenience that would result therefrom, and asked the court to appoint commis-

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sioners to review the proposed change. The petition stated that the road, as established, ran through the land of some of the petitioners, in such a way as to prevent them from cultivating the same. The court appointed three commissioners pursuant to the prayer of the petition, and at a subsequent term, they reported in favor of the change, and that all the parties over whose land the proposed road was to pass consented, except Williamson Geyer. At the same term, Geyer presented his remonstrance against the change, and asked the appointment of commissioners. The court appointed three new commissioners, who, at a subsequent term, reported in favor of the utility of the proposed change, both to individuals and the public, but did not assess Geyer's damages, nor report that none would be sustained. The court accordingly made an order establishing the new, without expressly vacating the old road, and at the same adjourned term, Geyer moved the court to vacate these orders, which the court overruled, and he appealed to the Cooper Circuit Court.

In the Circuit Court, Geyer moved to reverse the order of the county court, which motion was overruled. The Circuit Court then directed his counsel to proceed with the cause *de novo*, which they refused to do, stating that they relied upon their motion. Upon motion of the counsel for the county, the orders of the county were then affirmed, and Geyer appealed.

Leonard and Draffin, for appellant. The county court proceeded under the sixth and subsequent sections of the first article of the road law of 1845, which were repealed by the act of March 3d, 1851. None of the provisions of this latter act for the protection of private property were observed. The repealed and the existing laws were both disregarded, and the road was established through Geyer's farm against his consent and without compensation.

If this proceeding is to be regarded as one to procure a change in a road under the 20th, 21st and 22d sections of the first article of the law of 1845, it cannot be sustained, for in such a proceeding, there is no authority given to the county

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court to take a person's land without his consent, even for a compensation.

Hayden and Stephens, for respondent. 1. No appeal lies from the order of the county court to the Circuit Court. 2. If, however, an appeal lies, then the cause is to be tried *de novo* in the Circuit Court, and when the appellant refused to proceed, the order of the county court was properly affirmed. It was his business to show error in the proceedings in the county court. 3. If the Circuit Court had no jurisdiction to try the case anew, then, as there is no mode pointed out by the statute for preserving the evidence upon which the county court acted, by bill of exceptions or otherwise, this court cannot exercise its appellate jurisdiction.

SCOTT, Judge, delivered the opinion of the court.

1. In the case of *Oberbeck & Shaw v. Gallaway*, 10 Mo. Rep. 364, this court held, that no appeal will lie from the order of a county court establishing or changing a road, unless some private right be affected by such order, and that no person can become a party to such proceeding, so as to be entitled to an appeal, unless his private rights are affected thereby.

A general appellate jurisdiction is given by statute, from the county to the Circuit Courts, but there is no provision describing the manner in which this jurisdiction shall be exercised. Cases may arise in which the want of such a provision may cause embarrassment, but as the one under consideration discloses, on the record itself, the irregularities complained of, there is no difficulty in affording the relief sought by this appeal. Doubts have been heretofore entertained in relation to the propriety of making counties parties to the proceeding, instead of the petitioners and remonstrants or objectors, but as the act of the 25th January, 1847, in relation to state roads, in matters of the assessment of damages, contemplates that the county may be a party; and as the act of March 3d, 1851, sec. 10, subjects the county to the payment of costs, where the

objector obtains greater damages from the jury of householders than were awarded by the commissioners, we must suppose that the legislature intended that the counties should be parties to proceedings like those in this controversy. Without determining whether there may not be cases in which it would be improper to make the county a party, we are of opinion that this appeal is properly docketed.

2. The right to an appeal presented the only question of any difficulty in the case, for, on opening the record, a comedy of errors was apparent. The source of all the irregularities is the vagueness of the petition, in not stating under what section of the law the parties designed to proceed. From the language of the petition, one would be led to suppose that it was designed to obtain leave to turn a road, in order that the land through which it ran might be cultivated, under the 20th section of the first article of the act for opening and repairing roads and highways, approved March 26, 1845, for this section is not repealed by the act of 25th January, 1847. That act, it is obvious from its provisions, relates only to state roads, and it must be construed as affecting the sections of the second article of the act of 1845, and not those of the first article.

If the proceedings of the county court are to be regarded as taken under the 20th section of the first article of the act of 1845, they cannot be sustained, as they lose sight of that section in every particular. The court, under that section, had no right to turn the road on another's land against his consent.

3. In opening new roads, the mode of assessing damages for injuries sustained by reason of their running through the land of individuals, is prescribed by the act of March 3d, 1851, secs. 7, 8, 9 and 10. It is not pretended that any of these provisions have been complied with, in the proceedings now before us. Indeed, it does not appear that the parties were aware of the existence of that act.

It is shown by the report of the commissioners, that Geyer did not consent that the road should run through his land. This fact appearing, the only way in which his land could be

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taken for public use, was by a strict compliance with the terms of the law. It was useless to enter into a controversy, whether he had entered an appearance, or had notice of the proceedings in court, and did not object to them. As his consent was wanting, the only mode by which his land could be condemned for a public road was, to take all the steps required by law, in case of a party not consenting that a road should be opened through his land.

The other judges concurring, the judgment of the Circuit Court will be reversed, and this court, proceeding to enter judgment, reverses the judgment of the county court, ordering the opening of the road.

GREGORY, Plaintiff in Error, *vs.* EVANS *et al.*, Defendants
in Error.

1. Under the act of 1847, amendatory of the act of 1845, concerning executions, and before the passage of the act of 1853, debts and wages to the amount of one hundred and fifty dollars due to a defendant who had no other property, were not exempt from garnishment on execution.

Error to Osage Circuit Court.

On the 11th of May, 1850, Charles H. Gregory recovered judgment before a justice of the peace. Execution issued, and Jesse C. Evans and Richard A. Campbell were summoned as garnishees on the 6th day of December, 1852. Evans answered that he owed Davis \$31 75. Campbell answered that he owed him \$3 50. The justice rendered judgment against the plaintiff in the execution, from which he appealed to the Circuit Court. At the trial in the Circuit Court, Davis read in evidence a schedule of property claimed by him as exempt from execution, under the act of 1847, in which the debts due from Campbell & Evans were included, to the admission of

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which, the plaintiff excepted. The court gave judgment for the defendants, and the plaintiff appealed to this court.

Parsons, for plaintiff in error. When the garnishees were summoned, the execution law did not exempt debts to any amount from garnishment. Such was not the law until the act of February 9, 1853.

E. L. Edwards, for defendants in error.

RYLAND, Judge, delivered the opinion of the court.

1. The only point of importance in this case is in reference to the acts of 1847 and 1853, reserving property, &c., of defendant from execution. The act of 1847—(p. 52, pamphlet;) concerning "Executions," amendatory of the act of 1845, on the same subject, has the following provision: Sec. 1. "Each head of a family, at his election, in lieu of the property mentioned in the first and second subdivisions of the eleventh section of an act entitled "An act to regulate Executions," approved 26th March, 1845, may select, and hold exempt from execution, *any other property*, real, personal or mixed, not exceeding in value one hundred and fifty dollars."

The property mentioned in the two subdivisions of the eleventh section of the act of 1845, above named, is of the following description, viz: "First, ten head of choice hogs, ten head of choice sheep, two cows and calves, one plough, one axe, one hoe, and one set of plough gears; second, working animals of the value of sixty-five dollars."

The act of 1853, to amend an act amendatory of "An act to regulate executions," approved March 26, 1845, approved February 6, 1847, is as follows: Sec. 1. "The first section of the act to which this is amendatory, shall be so amended as to add after the word "dollars," concluding said section, the words, "or in absence of other property, debts and wages to the amount of one hundred and fifty dollars." This last act took effect from its passage, which was on the 9th February, 1853.

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From this, it is obvious that the last act was not in force at the date of the garnishment under the execution in this case, nor at the date of the judgment against the garnishees. These debts, therefore, of the garnishees, were not exempt from the plaintiff's execution.

The act of 1847 did not include "debts or wages," where there was no property; the act of 1853 was intended to embrace debts or wages, and to exempt \$150 in amount of such, in favor of the debtor in the execution. The judgment, therefore, of the lower court, exempting the indebtedness of the garnishees from the execution of Gregory, in this case, was erroneous.

These proceedings were had before the act of 1853 went into effect, and of course, cannot be helped out by that act; and, although the words of the act of 1847, "any other property, real, personal or mixed," are very comprehensive, yet we think they were not designed to include debts or wages; nor was it the intention of the legislature, under this law, to include, under these terms, what was not then liable to execution. The debts due to a man, or the wages due to a man, were not subject to be seized and levied on under execution; therefore, we cannot suppose the legislature intended, under these terms of exemption, to include subjects not then liable to execution.

The judgment below must be reversed, and the cause remanded for further proceedings, in accordance with this opinion, Judge Scott concurring; Judge Gamble not present.

RICE, Appellant, vs. MORTON *et al.*, Respondents.

1. One defendant is not a competent witness for his co-defendant.
2. The relation of principal and surety or of co-securities is not extinguished by judgment. Thus, where A. recovered against B. & C. as securities in a note, a judgment which was afterwards assigned to D., who directed the sheriff to return an execution issued thereon unsatisfied, when one half of the judgment debt might otherwise have been made out of the property of B., it was held, that C. was discharged to the extent of one half of the debt.

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Adams, for appellant. 1. The agreement made by Smith and Rice with the creditors, on giving this power of attorney to confess the judgment, whereby the debt was to be collected from each rateably, is such as should be enforced by a court of equity by injunction. See 4 John. Ch. Rep. 22. 2. The same principles of equity exist between co-securities, to be relieved to the extent of the share of each in the debt, by the acts, &c., of the creditor, as exist between them and the principal, to be relieved of the whole debt, by similar acts, &c., of the creditor with the principal; and when a creditor, by his acts or otherwise, discharges one surety, or relinquishes a lien, or suffers the same to be lost, against the will or consent of the co-security, he can only hold the other liable for his *pro rata* share of the debt. 1 Story's Eq., sec. 499, (note.) 2 Brockenborough's Rep. 159-168. 5 N. H. Rep. 38. *The Commonwealth v. Hass*, 16 S. & R. 252. *Mayhew v. Crockett*, 2 Swanst. 191-299, (note a.) 1 Law Library, 84-85-153. Theobald on Prin. and Security, secs. 174-274. 2d Am. Leading Cases, 126, &c. 1 Story's Eq., sec. 326 and 499. *Ferguson v. Turner*, 7 Mo. Rep. 497. 3. Morton being the assignee of the judgment, took it subject to all the equities existing between the original parties, and also subject to all the equities arising out of his own acts and conduct. 4. The first execution was issued and delivered to the officer, before the expiration of three years from the date of the judgment, and this, of itself, without any revival of the judgment, continued the lien against the real estate of Smith, till the return of the execution; and this lien was voluntarily relinquished by Morton. *Bank of Missouri v. Wells & Bates*, 12 Mo. Rep. 361-3-4. The doctrine of substitution does not apply to a case of this kind, and if it did, it would not debar Rice of his remedies against Morton, for the loss of the lien against Smith's property. Rice could only have been substituted to such securities as do not get back to the debtor on payment—

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such as mortgages or other collaterals. When a judgment is paid, it cannot be assigned, nor can there be any substitution; for the debt is extinguished by the payment. The old doctrine on this point has been overruled. 1 Story's Eq., 4 ed., sec. 499, (b.) 6. Trigg was an incompetent witness, and ought to have been excluded. He was interested, and also a party defendant, and could not be examined by the defendants by their motion. Laws Mo. 1849, p. 100. 7. Morton bought of Smith's property under junior judgments, and in consequence of the existence of the lien of this judgment, bought it at a less rate, by half the amount of this judgment, than he would otherwise have paid; and an injunction, therefore, to the extent of half this judgment, ought to be granted.

Leonard and Hayden, for respondent. I. The allegation in the petition in relation to the understanding of the parties, at the time of giving the power of attorney, furnishes no ground of relief, because, 1st, It was not a valid agreement—there was no consideration, and equity will not enforce a mere voluntary agreement; 2d, If it could be considered a good parol contract, to the effect that each surety should be liable only for one half of the debt, such an agreement would contradict the written instrument, which was an authority to take a joint judgment against both for the whole debt. II. The admission of Trigg, a witness, upon the trial, is no ground for a reversal. His testimony relates exclusively to the supposed agreement for the collection of the judgment rateably against the sureties; and if this agreement stands admitted by the omission to deny it, or if it is not a matter contested between the parties, the testimony is wholly immaterial, and could not have prejudiced the party, and its admission furnishes no ground for a reversal of the judgment. IV. The relation of principal and security does not exist between co-securities, so far as the creditor is concerned, and therefore, acts of the creditor that will discharge a security from his liability to the creditor for the whole debt, will not discharge a co-security from a proportional part of it. *Dunn v. Slee*, Holt's N.

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P. Rep. 399, reported in 3 Eng. C. L. Rep. 141. V. A judgment against the principal and security, extinguishes the relation of principal and security, and the security then becomes himself a principal debtor. *Laforge v. Hester*, 3 Denio, 157. *Hubbell v. Carpenter*, 2 Barb. 487. *Bay v. Talmadge*, 5 John. Ch. R. 305. *Lenox v. Prout*, 3 Wheat. 520. *Pole v. Ford*, 2 Chit. R. 125, (18 Eng. C. L. Rep.) *Findlay's Ex'rs v. Bank of the U. S.*, 2 McLean's Rep. VI. A security is not discharged by the creditors allowing the lien of a judgment to become extinct by the lapse of time. *U. S. v. Simpson*, 33 Penrose & Watts (Penn.) Rep. 439. *Morrison v. Hartman*, 14 Harris' (Penn.) Rep. 58. *Cathcart's Appeal*, 13 Harris' (Penn.) Rep. 420. *Schroeppell v. Shaw*, 3 Comstock's (N. Y.) Rep. 452.

RYLAND, Judge, delivered the opinion of the court.

This was a civil action, brought by Rice in the Cooper Circuit Court, against George W. Morton, Charles W. Todd, Charles H. Smith, and against Jordin O'Bryan, Thomas W. Nelson and William H. Trigg, the last three as executors of Jacob Wyan, deceased. The petitioner charges, that he and the defendant, Charles H. Smith, became the sureties of the defendant, Todd, in a note to the firm of Wyan & Trigg, executed on the first day of January, 1842, for three hundred dollars, due in six months, with ten per cent. per annum from date. The firm of Wyan & Trigg was composed of Jacob Wyan and William H. Trigg; that, after making said note, Wyan departed this life, and Trigg, as surviving partner, assigned the same on the 2d day of July, 1842, to Jordin O'Bryan, Thomas W. Nelson and himself, as executors of said Jacob Wyan, deceased; and that afterwards, at the November term, 1842, of the Circuit Court of Cooper county, in the state of Missouri, a judgment was rendered in said court in favor of said Jordin O'Bryan, Nelson & Trigg, executors of Wyan, against the said defendants, Todd and Smith, and the peti-

tioner, Rice, for the amount of said note and interest. The plaintiff, in his petition, alleges that this judgment was afterwards revived at the September term, 1845, of the said Circuit Court of Cooper: he makes an exhibit of the transcript of said judgment, and of the revival thereof, containing three executions, a copy of the note and of the assignment thereof. The plaintiff states that, afterwards, the said defendant, George W. Morton, became the assignee of the said judgment, and took the control and management thereof, before any execution thereon was issued, as he, plaintiff, believes and charges. The plaintiff states further, that Todd, the principal in said debt, at the time the judgment was rendered, and ever since has been, and is now, wholly insolvent, and unable to pay any portion of said judgment; but that said Smith, who was co-security of the plaintiff, had ample real estate situated in the county of Cooper, where said judgment was rendered, to pay and satisfy his half of the said judgment, and the said judgment was a lien thereon, and so continued until the same was lost by the voluntary act of the defendant, Morton, in refusing, though urged and solicited by the plaintiff, to have the said real estate levied on and sold during the pendency of the said lien. The plaintiff further states that, after the rendition of the said judgment, and during the pendency of the said lien, other judgments were rendered against said Smith, which were junior to the aforesaid judgment, and upon which junior judgments, under executions thereon, all the real estate aforesaid, of the said Smith was sold, subject, however, to the lien of the first named judgment; and no property of any kind, real or personal, of the said Smith was left, out of which his share of the first named judgment could be made, except the real estate which had been sold under said junior judgments and executions; and the said Smith became, and was, after the sales aforesaid, and still is, wholly insolvent and unable to pay his half of said judgment; and although the said sales were made subject to the said elder judgment, and the said Smith's part of said elder judgment might, and ought to have been made out

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of the said real estate, yet, the said Morton voluntarily relinquished the said lien, by refusing to have the said real estate sold under said elder judgment, to the extent of Smith's half thereof, and by wilfully and voluntarily causing the said executions, issued on said judgment, to be returned not executed, until the sales under said junior judgments have ripened into perfect titles. The plaintiff charges that Morton, contrary to the principles of justice and equity, and from some unjust cause or other, desired to make the whole amount of the debt out of the plaintiff, after he (Morton) had obtained the control of said judgment, well knowing, at the same time, that Smith was, in law and equity, bound for one half thereof; and that Morton, for this purpose, caused an execution, number "one," to be issued on said judgment, on or about the 11th of October, 1845, and placed the same in the hands of Isaac Lionberger, the then sheriff of Cooper county. Plaintiff states that then he was ready and willing, and offered to pay his half of said judgment, insisting and urging the said Morton to make the balance out of the said real estate of the co-security, Smith, which was then liable thereto, and subject to the lien thereof; but Morton refused to do this, and voluntarily caused the said sheriff to return the said execution without any action thereon.

The plaintiff states, that the said Morton, afterwards, on the 16th of April, 1846, caused another execution to be issued upon said judgment; that he again urged Morton to levy one half of the same, being Smith's part thereof, on the said real estate, and to carry into execution, against said real estate, the lien of said judgment to that extent. The plaintiff avers, that Isaac Lionberger, the sheriff of Cooper county aforesaid, was willing to do this, and was about to make the levy, when Morton, fraudulently and voluntarily, ordered the sheriff to hold up the execution, and not to levy the same; and when the term of office of said Lionberger, as sheriff, was about to expire, Morton caused him to make such return on the execution, which he did, and delivered the execution over to his successor, James

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Hill, who offered to levy the same upon said real estate, but Morton prevented him from doing so, and ordered Hill to return the said execution, not executed, which he did accordingly.

Plaintiff states, he offered to pay one half of said judgment to said Morton, but Morton refused to receive the same. Plaintiff then, with a view always to have in Morton's hands a fund to meet his half of said judgment, did, on the 10th day of August, A. D. 1846, put in Morton's hands the sum of two hundred and twenty-five dollars, as and for half of said judgment, and took a note from Morton, making it draw the same rate of interest as the judgment, with the understanding that Morton might, at any time, extinguish the note, by applying the same as a credit to plaintiff on said judgment. A copy of the note is made an exhibit, the original having been delivered up to Morton.

The plaintiff furthes charges, that execution number "three" was issued on said judgment on the 23d day of September, 1846, whilst the lien of said judgment was still in force: the plaintiff still urged Morton to have the same levied upon the said real estate: the sheriff was willing, and offered to levy the same upon said real estate, but Morton refused to permit him to do this, and fraudulently and wilfully required the sheriff to return the same not executed, which was done accordingly. The plaintiff charges, that Morton grossly neglected and wilfully refused to have the said lien of said judgment carried into execution against said real estate, and by this fraudulent conduct, and gross negligence, the lien of said judgment has been lost, and the sales under said junior judgments have ripened into perfect titles, leaving the said Smith wholly insolvent and without any means whatever, to answer over to the plaintiff, in case he be compelled to pay the same; that Morton, by his fraudulent conduct and gross negligence, has released Smith from the payment of his half of said judgment.

The plaintiff states, that it was the understanding of the parties, when the power of attorney was given to confess the judgment, and after the judgment was confessed, that the same

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was to be paid by the plaintiff and the said Smith, rateably, each paying one half, as the said Todd was wholly insolvent; and it was with a view to carry out this intention that the judgment was revived; and avers that, if the control of the judgment had remained in the hands of the original parties, this intention would have been carried into effect; but the said Morton, well knowing the premises, had fraudulently prevented the lien of said judgment from being carried into effect against the property of said Smith. Plaintiff states that, in fact, he has been informed, and charges, that said Morton, not only knew of said junior judgments, and of the sales thereon, but actually became a purchaser at such sales, and had full knowledge of the circumstances, both of the said Todd and of the said Smith; and that, unless the lien of the elder judgment was carried into execution against said Smith's real estate, nothing could be made out of them or either of them, and with this knowledge, and under these circumstances, being interested himself in the sale of Smith's property, he fraudulently and wilfully refused, and grossly neglected, though often urged so to do, to have said lien carried into execution, and by his conduct and acts aforesaid, the same has been lost.

The plaintiff states that, since the said lien has been lost, the defendant, Morton, has caused an execution, number "four," to be issued on said judgment, which was issued on the 28th of January, A. D. 1850, and threatens to have the same levied on plaintiff's property; plaintiff states that, since the issuing of said last execution, he went to Morton and delivered up to him his note, in discharge of plaintiff's half of said judgment, and offers, if that amount be not the half, to pay whatever may remain, prays for an injunction, &c., and other relief in general.

The defendant, Morton, answers this petition at great length, much of which is not necessary to be noticed in this opinion; a portion of the answer must be noticed, however, for the very guarded manner in which defendant responds to important allegations in the petition.

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The statute requires that the answer, in respect to each allegation in the petition controverted by the defendant, shall contain a *specific denial thereof, or of any knowledge thereof sufficient to form a belief*. Art. 6, sec. 7, New Code of Practice. And every material allegation in the petition, not specifically controverted in the answer as required, *shall, for the purposes of the action, be taken as true*. Article 7, section 12, same code.

Morton begins his answer by stating that, of *his own knowledge*, he does not know whether Charles H. Smith and the plaintiff, Rice, as the securities of Charles W. Todd, on the first of January, 1842, executed to Wyan & Trigg the note for the payment of \$300, with ten per centum interest per annum, as stated by the plaintiff. He admits that the note was made by Smith, Rice and Todd, to Wyan & Trigg, at the time mentioned, and for the sum therein mentioned, but he has no *personal knowledge* that Todd was principal, and that plaintiff and Smith were securities, and of this he requires strict proof. He admits the recovery of the judgment in the Cooper Circuit Court by O'Bryan, Nelson & Trigg, against the plaintiff, Smith and Todd, at November term, 1842, for the debt and interest, as mentioned in plaintiff's petition, but states as follows: "That this defendant does not know, nor hath he any personal knowledge that, at the time judgment was confessed by the plaintiff, Todd and Smith, that they, Smith and plaintiff, agreed that each one of them would pay, as securities, his equal moiety of the judgment, as the plaintiff hath stated in his said petition; and having no personal knowledge of such arrangement between plaintiff and Smith, that defendant requires strict proof thereof, if such agreement was made."

These statements in Morton's answer are not sufficient; they are not such denials as the statute contemplates, and the allegations in the plaintiff's petition, to which these statements were designed as answers, are to be considered, for the purposes of this action, as true.

The defendant, Morton, admits that, after the rendition of

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the judgment against Todd, Smith and Rice, the plaintiff, there were other judgments rendered by the Cooper Circuit Court against said Smith, and then, in his answer, mentions the various judgments against Smith, which it is not necessary here to state. He admits that an execution was issued on one of these judgments, on Brown's judgment, and was levied on property of Smith's, both real and personal, some time in October, 1844, and that in March, 1845, in virtue of a *venditioni exponas*, the property levied on was sold, and he, the defendant, did purchase at this sale a lot of land of the said Smith, at the price of \$225, and that other persons purchased other lands levied on. He admits that the judgment against Todd, Smith and plaintiff, in favor of O'Bryan, Nelson and Trigg, was the oldest judgment against said Smith, and that it was a binding lien on all the real estate of said Smith in Cooper county, for and during the space of three years from its rendition. He denies that the revival of the judgment is a revival of the lien: he then mentions Smith's contracting, about the 7th day of February, 1844, to sell a part of his real estate to Abraham Hathaway and Jacob Ingraham, for the price of \$3,200; that sale was made, and that he, defendant, afterwards, on or about the 2d of March, 1845, purchased of said Hathaway and Ingraham, one half the real estate they had before bought of Smith, for the sum of \$1600; that Hathaway and Ingraham sold the remaining half to Joseph H. January, for \$1600, about the same time that the purchase of this defendant of them was made. He then speaks of Tompkins having caused an execution on a judgment junior to O'Bryan, Nelson and Trigg's, but older than the one under which he, the defendant, had bought a lot, to be issued and levied on the real estate which he had purchased of Hathaway and Ingraham, and caused the same to be sold; and that, at this sale, Ingraham was forced to purchase the said property, in order to secure it to January and this defendant.

This defendant admits that, after this sale, made by Tompkins, of the property which defendant and January had bought

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of Hathaway and Ingraham, and which Ingraham had to rebuy, in order to secure this defendant and January in their previous purchases from Hathaway and Ingraham, that Smith, during this time, was the owner of other real estate, to the value of six or seven thousand dollars, which was bound by the liens of the judgments mentioned in his answer. He and the said January did purchase the judgment of O'Bryan, Nelson and Trigg, against Todd, Smith and the plaintiff. He denies that he is the sole purchaser, but admits that he and January bought the judgment: he denies that it was purchased for the purpose of oppressing the plaintiff, or injuring him: he admits that he and January purchased the judgment, knowing it to be the oldest judgment upon record, and binding upon the real estate of Smith, in Cooper county, with a view of protecting their aforesaid real estate, held in common, from a similar act of oppression and injustice, which they feared might be exerted against it by the said Tompkins, if he should purchase the same, (as he, Morton, feared he would,) by again throwing the whole burthen of this judgment also upon their, the said Morton and January's said property. Defendant admits that his individual motive, in addition to the object of himself and January above stated, was to have an execution issued thereon, to be levied on the said real estate, which he had purchased at the price of \$225, under Brown's execution, fearing that the property so purchased was not sufficiently described and identified by the sheriff's advertisement, under which he made the sale to the defendant, Morton. Defendant, Morton, admits the four several executions; he has no recollection of causing the execution, number "one," to be issued; but thinks it was issued prior to his and January's purchase: he admits that he endorsed upon said execution an order to the sheriff, in these words: "The sheriff of Cooper county is requested to return this execution not satisfied, by order of the plaintiff. G. W. Morton, assignee." He says that he and January purchased the judgment on the 8th day of December, 1845. Defendant does not know the precise time he made the endorse-

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ment above on the execution, but says he believes it was about the date of the sheriff's return of the execution : he says he has no recollection of the plaintiff's making, at any time during the time the said execution was in the sheriff's hands, any wish or request to this defendant, to have the same levied on the real estate of said Smith, to obtain satisfaction of the same or any part thereof, as plaintiff has charged in his petition. Defendant denies any recollection of having given to the sheriff any directions not to levy the execution on any property of Smith's, or of any of the other defendants therein.

Defendant admits that execution number "two" was issued with his consent : he has no recollection of ordering the issuing of it ; it was issued on the 15th of April, 1846 : he denies any recollection whatever of any thing having been done or said by him to the sheriff in whose hands it was, in regard to his levying or not levying the same upon Smith's property ; or of any thing having been said by plaintiff to him, in which he urged or expressed a wish, or in any manner requested this defendant to cause the same to be levied upon the real estate of Smith, in order to obtain satisfaction of the whole or any part thereof, out of Smith's real estate, before the 10th day of August, 1846 : he says that Rice, about this time, made known to him that the sheriff had called on him for the money or property, in order to satisfy the execution ; then plaintiff, for the first time, stated to him that he was co-security with Smith, and that it was hard for him to pay the whole : offered to pay defendant one half of the debt, and expressed a wish, in substance, that the remainder should be made of Smith. Defendant states that, to these statements of plaintiff, he replied that, when he and January bought the judgment upon him, Todd and Smith, they knew them to be able to pay it, and looked upon them all as principals, and equally bound for the whole debt ; and knew nothing as to the fact of Smith and Rice being securities for Todd, and would have nothing to do with that matter. Plaintiff then proposed to pay to defendant half of the amount of the execution, and have it credited on the same ;

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this defendant would not have it credited on the execution, but took the money and gave plaintiff his note for the same, drawing same rate of interest as the judgment ; and defendant says this is all that he recollects in regard to said execution number "two," except that he thinks he may have given the sheriff authority to return the same not satisfied ; but this he does not recollect.

The defendant admits, in regard to the third execution, that he and plaintiff tried to have it levied by the sheriff on the property or lot which he, defendant, had bought, as stated before, for \$225, of said Smith, at sheriff's sale ; but failing to do this, and learning from sheriff that he would levy the same on that part of the real estate of Smith which had been last sold ; and finding that to be the property which defendant and January had bought from Hathaway and Ingraham, this defendant refused to permit the sheriff to make the levy and sale of this last mentioned property. Defendant admits that he told plaintiff, Rice, if the sheriff would levy on the lot which defendant had bought at sheriff's sale, for \$225, as above mentioned, he, defendant, would guaranty that it should and would sell for the one half of the amount of the execution.

In regard to the execution number "four," the defendant admits he caused it to be issued, but took no control over it, except to tell the sheriff to make the money, and not to levy it on the property which he and January had bought of Hathaway and Ingraham, and that, at the request of plaintiff, he had endorsed upon the execution a credit of \$225, as having been paid by plaintiff on 10th August, 1846. Defendant denies ever refusing to permit sheriff to levy any or either of said executions upon the real estate of said Smith, bound by said judgment, when it was rendered, except the real estate which he and January had purchased as aforesaid, and then, only as stated above. He denies that Smith ever requested him to have the executions levied upon the real estate of him, Smith ; denies that either Lionberger or Hill, as sheriffs, or either one, ever did offer to levy said executions upon any other property

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of which Smith had been owner, than that purchased by this defendant and January of Hathaway and Ingraham. The defendant states, that he and January did not purchase the judgment, nor have the control of the execution, until after the lien of said judgment had expired, as he believes.

I have thus noticed, at too much length, I fear, the various matters set up by Morton in his answer. Upon this answer coming in, Rice filed his supplemental petition, making January a party.

January failed to answer, although served with process, and judgment by default was taken against him, and the matters alleged in plaintiff's petition taken as confessed against said January.

Morton afterwards filed his amended answer, stating that he was informed, and believes that Rice, the plaintiff, after the rendition of said judgment, procured the delay of the execution of said judgment, by paying to one of the plaintiffs in said judgment an additional premium of three or four dollars; that for this consideration, indulgence was given, and thereby said Smith was absolved from all responsibility as co-security, to pay his aliquot part of said judgment.

The finding of the court below was as follows: "The court finds the issues for said defendants." Judgment was given for defendants. The plaintiff afterwards moved to set aside the finding and judgment, and to grant him a new hearing; this motion being overruled, the plaintiff excepts and brings the case here by appeal.

The record shows (by the bill of exceptions) that the plaintiff read the exhibits mentioned in his petition in evidence, to wit, the judgment in the case of Wyan's executors v. Todd, Smith and Rice, including the power of attorney to confess said judgment, the revival of said judgment, and the several executions thereon, and the several endorsements on said executions, and a copy of the note delivered up to Morton. Plaintiff then introduced as a witness, Charles H. Smith, one of the defendants, who testified that, at the time the power of attorney was

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given to confess the aforesaid judgment in favor of Wyan's executors, he and the plaintiff were the securities of Todd; that Todd was wholly insolvent, and has ever since remained so. At the time the power of attorney was given, it was agreed between the parties, the said Smith and Rice and the said executors, that, if they, Rice and Smith, would execute the power to confess, the plaintiffs in said judgment would collect it rateably from the said Smith and Rice; that is, one half from Smith, and the other half from Rice, and those were the terms upon which the power was given. All parties considered Todd as wholly insolvent.

Isaac Lionberger, a witness for plaintiff, stated, that he was sheriff of Cooper county in the year 1845, and up to August, 1846, when James Hill was elected; that J. J. Wilson was his deputy; that, on the 11th of October, 1845, execution number "one" on said judgment against Rice, Smith and Todd came to his hands, as sheriff of Cooper county, and soon after it came to his hands, the plaintiff, Rice, came to him and told him that he was ready to pay his half of the execution, and that he must make the other half out of Smith's property; and afterwards, when Morton, the defendant, became the owner of the judgment, Rice again called on him, and told him he was ready to pay his half of the execution, and to make the other half out of Smith's property; that he saw the defendant, Morton, and told him of Rice's request, and Morton told him to hold up the execution, and not to levy it; this order of Morton's was verbal, and was given sometime before the return of the execution; and before the execution was returned, he got Morton to endorse his order in writing, on the back of said execution, and the said order, so made, is now on said execution, and the return thereon made by his deputy, was made in accordance with the directions of Morton. Witness also stated, that the execution number "two" came to his hands in April, 1846, and soon thereafter, Rice again called upon him, and told him he was ready to pay his half of the execution, and to make the other half out of Smith's real estate; but Morton requested

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the execution to be held up, and it was accordingly held up until Hill came into office, and it was then given over to Hill, with that order or request upon it as the return. Witness stated that all Smith's real estate had been sold under junior judgments; also all his personal estate had been sold before any execution came to his hands against Todd, Rice and Smith; that when the execution came to his hands, the real estate so sold under junior judgments, was amply sufficient to have paid off the execution, and the money would have been made upon the same, if it had not been for the defendant, Morton's, orders; that he could and would have made half of the execution out of Smith's real estate; that, independent of the real estate that had been sold under junior judgments, Smith had no property and was insolvent, and the money could not have been made in any other way out of him than by the sale of the said real estate.

James Hill, a witness for plaintiff, stated that he was elected sheriff of Cooper county, Missouri, in August, 1846; that soon after his election, the former sheriff delivered over to him the aforesaid execution number "two," and Rice called on him and told him he was ready to pay his half of the execution, and to make the other out of Smith's real estate; witness communicated this to Morton; that Morton asked witness how and in what order he intended to sell Smith's property, and he told Morton he had advised with several lawyers, viz: Leonard, Adams and Hayden, and they had told him to sell that part of Smith's property first, which had been last sold under the junior judgments, and Morton replied, if he did, that he would commence with the lot he, Morton, had bought under Brown's execution, and he would not suffer his own property to be sold, and directed him to return the execution not satisfied, without any proceedings thereon; he accordingly did so; that execution number "three" was placed in his hands, and, in the meantime, Rice had put into Morton's hands his half of the judgment, and took Morton's note for the same; that Rice directed him to make half of the execution out of Smith's

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property, but Morton directed him not to proceed, and to return the execution not satisfied, and he did so, in accordance with Morton's directions.

It was also in evidence, that Morton and January had bought of Smith the house and lot mentioned in Morton's answer, and had been in the occupancy and enjoyment thereof ever since their purchase.

William H. Trigg, a witness, was introduced by defendants, and objected to by the plaintiff; the court overruled the objection; the plaintiff excepted. The witness, Trigg, then testified, that he had no recollection of the agreement spoken of by the witness, Smith: there may have been such an agreement; thinks he agreed to indulge: the reason he supposes that the agreement spoken of might have been made is, that they said they desired each to have the debt to pay. This was all the evidence given in the cause, as appears by the bill of exceptions.

1. From the foregoing statement, it is obvious that several important questions present themselves for our consideration.

In the first place, the omission of the court to find the facts upon which its judgment is given, is fatal to such judgment. In the second place, the admission of one co-defendant as a witness for another, on the motion of such defendant, and against the objection of the plaintiff, is erroneous. Trigg should not have been permitted to testify for his co-defendant, Morton.

2. But the main questions arise upon the conduct of Morton, as charged in the petition, and sustained in proof, as appears by the bill of exceptions, in regard to the several executions issued on the judgment against Rice, Smith and Todd, in favor of Wyan's executors.

These questions relate to the validity of the agreement or understanding alleged to have been made between the parties, that is, the executors of Wyan and Rice and Smith, as the inducement for the power of attorney to confess the judgment.

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They also involve the rights and duties existing between principal and surety, as well as between co-sureties.

This court might have contented itself, by reversing the judgment of the Circuit Court on the errors mentioned above; but then, the main questions would have still been undecided between these parties; and as the counsel for the parties argued the questions at great length, and with great ability, and desired the opinion of the court thereon, we have deemed it advisable to give our views, in order to a final settlement of the matters in issue.

In the case of *Briggs v. Law et al.*, 4 John. Ch. Rep. 22, an agreement, on the part of a creditor, to collect money *rateably* of the several parties to a note, on their giving a judgment bond for the amount, was enforced by injunction. The chancellor said that "the agreement was binding in equity and conscience."

In this case before the court, a power of attorney was given to confess judgment, by Rice, Smith and Todd, in favor of Wyan's executors, upon the agreement and understanding that the judgment should be collected *rateably* of Rice and Smith—Todd being, at the time, wholly insolvent. The judgment was so confessed, and such an agreement, being, in Chancellor Kent's language, "binding in equity and conscience," this court will not declare it otherwise.

In the case of the *Commonwealth against Miller's Administrators*, 8 Serg. & Raw. 458, Gibson, Justice, who was afterwards Chief Justice, says: "But there is no clearer rule in equity than that, where the creditor has the means of satisfaction in his hands, and chooses not to retain it, but suffers it to pass into the hands of the principal, the surety can never be called on. Here there was a levy on personal property belonging to the principal, and that was satisfaction *pro tanto*, as regards the sureties, of the benefit of which, nothing could deprive them, except an assent on their part to the arrangement, by which the property was released. That, however, is

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not pretended. But it is said, the distinction between principal and surety ceases after judgment has been obtained on the original security; and that, as to subsequent transactions, equity views them with equal favor. If that be so, I am ignorant of any authority which bears it out, and on the ground of reason, it certainly cannot be supported. The distinction is carried throughout."

In the case of the *Commonwealth v. Haas et al.*, 16 Serg. & Raw. 252, Rogers, Justice, said: "If the creditor has the means of satisfaction in his hands by legal process, and chooses not to retain it, but suffers it to pass into the hands of the person whose property it was, and he afterwards becomes insolvent, a joint *principal* cannot be called on. It is a discharge of the other principal *pro tanto*, at least, if it does not exceed a moiety of the debt." The facts in this case are the same as those in the case of *Commonwealth v. Miller's Administrators*, above cited, from 8 Serg. & Raw.

In *Henderson v. McDuffee*, 5 N. H. Rep. 38, the rule of law, said the court, by which a contribution among the sureties is enforced, is founded upon fixed principles of natural justice. The parties, in such a case, stand *in equali jure*, and equality with them is equity, and one of them ought not, in justice, to be compelled to bear the whole burthen in ease of the rest, but it should be thrown on all equally.

In *Dixon et al. v. Ewing*, 3 Hammond, 280, it was held by the Supreme Court of Ohio, that a creditor, by releasing the property of the principal, taken in execution, exonerates the surety. The court said: "As Foot was the principal debtor, and the complainants his sureties, the judgment creditor was bound, at least, to let the law take its course, without interfering to exempt the principal debtor, or to relieve his property, in such way as to increase the risk or eventual loss of the security.

The question is not, what degree of diligence is required, or what degree of negligence may be permitted in the judgment

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creditor, in relation to the safety of the sureties, but how far he may be allowed to *injure* them by his acts.

In the case of *Baird v. Rice*, 1 Call's Rep. 18, the head note of the case, which is fully borne out by the several opinions of the judges of the court of appeals of Virginia, is as follows: "A. recovered judgment against B. and C., his surety. A. issued execution thereon, which was levied on the property of B. The plaintiff, A., on receiving part of the money, gave B. further time for the balance, and ordered the officer to restore the goods to B. Held that, by this procedure, the judgment was discharged at law, and C., the surety, not having assented to, or acquiesced in the agreement, was discharged in equity, in which he was protected against a second execution by injunction." Roane, Judge, in delivering his opinion, said: "During all these measures, the plaintiff is not bound to do any thing: he may remain a silent and inactive spectator, and is supposed to be totally unconcerned in the transaction. But if he voluntarily intrudes himself therein, he may release the obligation of the sheriff to proceed; he may lose his lien upon the property, and may discharge third persons, otherwise liable, in the event of the property seized being insufficient." Carrington, Judge, said: "I admit that Baird was not bound to indemnify the sheriff, and if the case rested upon that point, he would have been safe; but his consenting that payment should be delayed, and releasing the property, changed the complexion of the case altogether, and discharged Rice from his covenant." Pendleton, president, said: "The execution levied on considerable property, restored to Black by order of the creditor, on payment of part of the money, and a further day given for the balance, was a total discharge of the judgment as to Rice, at law, if the sheriff had done his duty, in returning the execution with the truth of the case. But he having neglected this, Rice is driven into a court of equity for relief, where things are considered done which ought to have been done." Pendleton, president, proceeded:

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"I come now to the conduct of Mr. Baird. The cases from Douglass, *Dingwall v. Dunster*, Doug. 235, and from Ves. sr., *Bishop v. Church*, 2 Ves. sr., 103, 372—were cited to prove that a creditor, to preserve his remedy against his security, is not obliged to give him notice that the principal has not paid, nor to use legal diligence against him, short of the time prescribed by the act of limitations, nor to sue, though desired by the security. Upon which, I observe, that the case in Ves. sr., was going a long way for a court of equity, and perhaps our act of assembly, which obliges the principal to sue, when required by the surety, is better. But if full force be allowed the doctrine, it will not profit Baird in the present case. If, indeed, he had forborne to act, refused to give the security to the sheriff, and left him to the duty of his office, no *laches* could have been imputed to him, and Rice's exoneration must have depended on the final event of that execution. But Baird did act, he received a part of the money, gave Black a further day for the balance, and directed the property to be restored. I conclude as I began, that the sheriff ought to have returned that the property seized had been restored by order of the plaintiff, which would have been a discharge of Rice at law, and this court, considering it as done, will give it the legal effect." In *Bullit's Ex'rs v. Winstons*, 1 Munford, 269, it was held by the court of appeals of Virginia, that a plaintiff, by directing a sheriff to put off the sale of property taken in execution, to a day after the return day, and to suffer the property to remain in the possession of the principal defendant or his securities, releases the securities altogether from that or any subsequent execution, such direction being given without their concurrence.

In *Bangs v. Strong*, 10 Paige, 16, the Chancellor of New York said: "Any valid or binding agreement between the creditor and the principal debtor, or other active interference of the creditor, whereby the surety may be injured or subjected to increased risk, &c., if done without the assent of the surety, will, in equity, discharge him from his liability. In *Jones*

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& *Lee v. Bullock, &c.*, 3 Bibb, 467, the court of appeals of Kentucky held, that a stay of execution, by the creditor, when levied on the property of the principal debtor, without the privity or consent of the securities, will operate to release the securities.

In *Sneed's Executor v. White*, 3 J. J. Marshall's Rep. 528, Chief Justice Robertson said : " A stay of execution by the creditor, after a levy of it on the property of the principal debtor, will exonerate his security, if the lien resulting from the levy be extinguished, and the surety did not approve the indulgence. This is in perfect accordance with the general principle which has been defined ; for, by releasing the property levied on from the lien, the creditor increases the risk of the surety. It is the fact, that the creditor interfered and increased the risk of the surety, and not the extent of injury resulting from his act, which will release the surety from his liability in equity. It was held in the case of the *U. S. v. Simpson*, 3 Penn. Rep. 437, that the judgment creditors permitting the lien of the judgment to expire by the lapse of time, and the omission to take the necessary steps for its continuance, will not thereby discharge the surety. In 2 American Leading Cases, 126, *et seq.* the subject is elaborately discussed. The creditor may refuse to go further, but he cannot withdraw any of the steps which he has already taken, and the surety will be discharged as soon as mere inaction is exchanged for a voluntary relinquishment of any hold, however obtained, against the estate of the principal. The difference between securities given by the debtor and those compulsorily obtained by the creditor, would appear to be reasonably well established on the one hand, and that between a mere omission to proceed further, and a direct abandonment of previous proceedings on the other ; and, while a party, who has accepted a pledge from his debtor, will be liable to all losses which could have been prevented by the exercise of reasonable diligence, he will only be bound to abstain from taking any steps directly tending to impair the validity of those liens which have resulted from

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compulsory measures. In the case of *Mayhew v. Cricket*, 2 Swanston, 185, the Lord Chancellor said: "I always understood that, if a creditor takes out execution against the principal debtor, and *waives* it, he discharges the surety, on an obvious principle, which prevails both in courts of law and of equity. The principle is, that he is a trustee of the execution for all parties interested. See Theobald on Principal and Surety, sec. 174, also 274.

The same principles of equity exist between co-sureties, to be relieved to the extent of the share of each in the debt, by acts of the creditor, as exist between them and the principal, to be relieved of the whole debt, by similar acts of the creditor with the principal; and where a creditor, by his acts, discharges one surety, or actively relinquishes a lien, he can only hold the other surety liable for his *pro rata* share of the debt. 1 Story's Eq. sec. 499, and 499 (*a.*) 2 Brockenbrough, 167. Chief Justice Marshall, speaking on the principle of substitution, says: "It has been supposed that, though this rule must be admitted as applicable to principal and surety, it will not apply between co-sureties." He says, "I can perceive no reason for this distinction. The principle is completely established in the books, and being established, it must apply to all persons who are parties to the security, so far as is equitable." I know that there are authorities both for and against the proposition, that a judgment recovered extinguishes the relation of principal and security, and that the security then becomes himself a principal. I have traced all of the decisions for the proposition, that I could find in the American courts, back to the observations of Mr. Justice Livingston, in his opinion in the Supreme Court of the United States, in the case of *Lennox v. Prout*, 3 Wheat. 525. His observations were not necessary in that case on this subject, and may be considered but *dicta*—not called for by the facts of the case. The cases in the brief of the counsel for Morton, on this subject, bear him out; but there are many others contrary thereto, and, in the language of Chief Justice Gibson, this doctrine of a judgment extinguishing the relation

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between principal and security, on the ground of reason, certainly cannot be supported. The distinction is carried throughout. This doctrine too, is inconsistent with our own statute law, which keeps up the distinction, by affording facilities to securities who have paid judgments for their principals, to obtain judgments against such principals, on giving notice and moving in court for that purpose. On this point, the law is against the appellee beyond doubt. This court, in the case of the *Bank of Missouri v. Wells & Bates*, 12 Mo. Rep. 361, held, "If an execution be issued on a judgment, and levied while the judgment is a lien upon real estate, the effect of this would be, to continue the lien and its priority until the writ is executed; although, before it is executed, the time during which the judgment is a lien had elapsed. This doctrine will be adhered to.

In the case of *Ferguson, surviving partner, &c., v. Turner*, this court held that, when an execution had issued, and was in the hands of the sheriff a lien on personal property, a voluntary discharge of that lien would discharge the security." 7 Mo. 498.

Morton must be considered, as the assignee of the judgment of Wyan's executors against plaintiff, Smith and Todd, as standing affected by all the equities which were existing between the original parties, and, beyond controversy, is subject to all the equities arising out of his own acts and conduct, as the power of attorney to confess judgment, and the confession of the judgment was upon the agreement and understanding that the judgment creditors would collect it rateably of the plaintiff and Smith; and, from the testimony in the bill of exceptions, there being every reason to suppose, that the judgment, according to the understanding of the original parties, would have long since been satisfied by the plaintiff, and out of Smith's real estate rateably, had not Morton interfered, by purchasing the judgment and controlling the executions thereon, thereby completely and actively stopping the process, and preventing sale of a co-surety's property originally bound to pay one half of

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the judgment, and completely and utterly rendering it impossible now for plaintiff to have any relief from his co-surety, Smith. Morton must not complain, if the consequences of his own conduct, under the general principles of both law and equity, as deducible from the authorities above cited, be visited on his own head. He did not stand still and let the lien of the judgment, which he had bought, expire; but when he bought the judgment, there was out in the sheriff's hands an execution, which the sheriff says would have been satisfied out of Smith's real estate, one half, and out of the plaintiff the other half. Plaintiff offered to pay his half to the sheriff, and told and directed the sheriff to make the other half out of Smith's real estate. The sheriff informs Morton of this, and Morton directs him to stop, and return the execution not satisfied. Can any one doubt but that this very act of Morton was, in the language of the Chancellor of New York, "An active interference of the creditor, whereby the co-surety, Rice, was greatly to be injured, and subjected to increased risk. Morton bought the judgment when the execution was already in the sheriff's hands: he had then no right to stop it, so as to injure Rice or increase his risk, yet he stopped not only this, but two other executions. From the whole case, it is manifest that Morton's volunteer purchase, and his subsequent control and direction of the executions, have completely thrown the burthen on Rice, to the exclusion of Smith's real estate.

The plaintiff, from the evidence preserved, is entitled to the relief sought by him in his petition; but as the court failed to find the facts required by law, and for the errors heretofore mentioned, the judgment must be reversed. We send it back, to be further proceeded with, in accordance with the views and principles set forth in this opinion. The other judges concur.

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DONIPHAN & BALDWIN, Appellants, vs. PAXTON, Respondent.

1. A mortgage with power of sale provided that the money arising from a sale should be applied to the payment of the debts mentioned in the deed, and the surplus, if any, should be paid to the grantor or his order. At the foot of the deed was this memorandum, proved to have been made before execution, at the request of the grantor: "I also owe P. F. \$400 and A. K. \$200, with interest, which are to be paid and made liens with the above." Held, the memorandum was to be taken as part of the deed, and had the effect to make the demands of P. F. and A. K. liens upon the surplus.
2. Where P. F. proved an indebtedness to the amount secured by the deed, and claimed nothing more, in a controversy between him and a subsequent incumbrancer, it was held immaterial whether the note presented by him as evidence of the debt imported on its face a valuable consideration or a gratuity.

Appeal from Platte Circuit Court.

This was a motion filed by Doniphan & Baldwin upon the report of William M. Paxton, trustee, appointed to manage the estate of John Florish, an imprisoned convict, under the tenth article of the act concerning "Practice and Proceedings in Criminal Cases," (R. C. 1845.) The trustee reported that the assets of the convict consisted of the proceeds of the sale of a tract of land amounting to \$3000, and that he had allowed debts against the estate, to the amount of \$4008 92, of which \$3675 92 were liens on the land. Among the debts reported as liens was one to Bird, Doniphan & Rees, for \$1000, secured by a mortgage with power of sale, dated November 28, 1851; one to Peter Florish for \$400, and one to A. Kern, for \$212, secured by the same deed, and one to the appellants, Doniphan & Baldwin, for \$600, secured by a mortgage of subsequent date. The motion was, to postpone the claims of Peter Florish and A. Kern, to the demand of Doniphan & Baldwin, and to disallow altogether the demand of Peter Florish.

On the hearing of the motion, the mortgage to Bird, Doniphan and Rees, with power of sale, dated November 28, 1851, was read in evidence. In this deed, it was provided that, in

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case of a sale, the proceeds should be applied, first, to the payment of the indebtedness of \$1000 to the grantees, "and, secondly, to the discharge of all liens then remaining on said land, and especially to the three judgments confessed by me in vacation (specifying them) which judgments and the amounts therein specified, I hereby authorize to be paid out of my said land, if not otherwise discharged by me, and *the balance, if any, to be paid over to me, or to my order and direction.*" At the foot of this deed was the following memorandum, proved to have been made at the request of the grantor before execution and acknowledgment: "I also owe Peter Florish four hundred dollars, and Anthony Kern two hundred dollars, with interest, which are to be paid and made liens with the above."

There was also read in evidence a note from John Florish and J. Mettier, to A. Kern, for \$212, dated September 13, 1851, payable six months after date, "for value received;" also a translated copy of a note in the German language, from John Florish to Peter Florish, which was in these words:

"Weston, October 16, 1850,

"The undersigned promises his son, Peter Florish, the sum of four hundred dollars, without interest, in two years from to-day, for his interest in my estate. Given as above.

"JOHN FLORISH."

A witness testified that the German word "*erbtheil*," which was translated "his interest in my estate," means the estate which the child inherits on the death of his parent.

There was evidence that John Florish was indebted to his son, Peter, for two years' labor, at the rate of \$200 per annum.

The motion to postpone and disallow was overruled, and the debts to Peter Florish and Kern were ordered to be paid prior to the note to Doniphan & Baldwin. The latter appealed to this court.

A. Leonard, for appellants. 1. The memorandum at the foot of the mortgage deed does not constitute the debts embraced in it a lien on the mortgage premises, for want of apt

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words to create such a lien. 2. The \$400 note to Peter Florish is without consideration—a gratuitous promise of a father to make an advancement to his child—not entitled to payment as a legal right, even against the father, much less against the father's creditors for value. Parol evidence is inadmissible to contradict the note and prove that it was for work done, and not an advancement, as stated in the instrument itself. *Mead v. Steger*, 5 Porters' (Ala.) Rep. 503. *Benedict v. Lynch*, 1 J. C. R. 380. *Woodbridge v. Spooner*, 18 E. C. L. R. 198. 3. The debt allowed to Kern out of the proceeds of the mortgaged property, was a note given by Florish & Mettier for \$212 and interest; and not the debt of Florish alone for \$200, of which Doniphan & Baldwin had notice through the registry of the instrument that created it, when they acquired their lien.

W. P. Hall, for respondent. 1. The note to Peter Florish shows on its face that it was given for a valuable consideration. It is expressed to be given for his *interest* in the estate of John Florish. If he had any such interest, either by deed or contract, the note was given for a valuable consideration. Besides, there was evidence to show that it was given for services, which was admissible. *Dorsey v. Haggard*, 5 Mo. 420. *Henderson v. Henderson*, 13 ib. 151. *McCrea v. Purmort*, 16 Wend. 460. *Duval v. Bibb*, 4 Henn. & Mun. 113. 1 Randolph, 219. *Hinds v. Longworth*, 11 Wheat. 199. 2. The sum secured by the mortgage is not stated to be on any particular account. Hence they were entitled to it either upon bond, note or open account. 3. The demands of Kern and P. Florish were secured by the eldest mortgage. *Wheeler v. Freeman*, 13 Pick. 165. *Heywood v. Perrin*, 10 Pick. 228. 10 Pick. 298. *Scott v. McCulloch*, 13 Mo. 13. 3 Bibb, 11.

GAMBLE, Judge, delivered the opinion of the court.

1. The deed made by John Florish to Bird, Doniphan & Rees, and which is a mortgage, with power to sell, appears to

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be the first incumbrance upon the property sold by the trustee ; and the chief question is, whether that instrument, with a memorandum written at the foot, before it was executed, by which the purpose of the grantor was declared, that the conveyance should stand as security for debts due to Peter Florish and Anthony Kern, had the effect of making those debts an incumbrance upon the property, as against the subsequent incumbrance of Doniphan & Baldwin.

The language employed in the memorandum attached to the deed, shows the purpose of the grantor to secure the debts of Kern and Peter Florish. If that memorandum was a qualification of the terms of the deed, being written upon it at the request of the grantor before it was executed, it is to be taken as a part of the instrument. *Heywood v. Perrin*, 10 Pick. 228. *Wheelock v. Freeman*, 13 Pick. 165. *Wilson v. Headly*, 3 Bibb, 11. *Nichol's Adm'rs v. Douglass et al.*, 8 Mo. Rep. 50.

The deed directed that, upon a sale being made, because of the failure to pay the debt to the grantees, Bird, Doniphan & Rees, the money arising from the sale should be first applied to the payment of the expenses, and to the payment of the debt to the grantees, and next, to the payment of other incumbrances, and particularly, three judgments which are specified in the deed, and the balance should be paid to the grantor or his order. The memorandum operates upon this last clause of the deed, and so qualifies it, that the debts mentioned in the memorandum are to be paid out of such surplus. As the conveyance was to Bird, Doniphan & Rees, with power to sell and pay these debts, the grantees became trustees for the benefit of the creditors named in the memorandum, in respect to the surplus, after the payment of the debts previously mentioned in the deed ; and the debts mentioned in the memorandum became liens on the property, taking rank next after the other debts secured by the deed.

2. In respect to the note executed to Peter Florish, there would seem to be no importance in examining the question,

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whether it was given for a valuable consideration, or as a gratuity, as it does not appear that the note is claimed of the estate of the convict as a debt separate from that secured by the deed of trust. It appears that there was an indebtedness equal to the amount secured by the deed, for the work and labor of Peter Florish, and, whether that is the debt for which the note was given or not, is not material, if only one sum of \$400 is claimed. The note is in the German language, and the translation of it makes the consideration to be, "the interest of Peter Florish in the estate of John Florish." There may have been some previous settlement or contract, under which Peter claimed an interest in property held by John Florish, at the death of John, and which Peter relinquished when he took this note. It may have been that the parties described the consideration in language not precisely adapted to convey an idea of the fact. It is certain that the maker assumed an absolute obligation to pay, and to pay at a fixed day, and that a consideration is stated in a very unusual form. If, upon any supposition, that language can be understood as importing a valuable consideration moving to the father, the note will be understood as being made upon such consideration. But it is not necessary to pursue this discussion, because, by the deed and the evidence, it appears there was an indebtedness for labor, and that that debt amounted to the same sum with the note, and the only debt claimed is of the same amount; therefore, as to that amount, the deed secures Peter Florish.

In respect to the debt to Kern, if the claim is to take priority, according to the memorandum on the deed, it can only be for the sum in that memorandum, and not for a larger sum evidenced by a note. The memorandum states a debt to Kern of \$200—a note is produced for \$212. The deed stands only as security for \$200, as there is no reference in the memorandum to a note.

The decision of the Circuit Court was correct upon the claim of Peter Florish, and was also correct upon that of Kern, in declaring that the debt due to Kern, as stated in the memoran-

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dum, is a lien upon the land. The decision of the court does not state that the debt due by the note is a lien, but that "the debts in said memorandum are liens." This decision, when confined to the amounts stated in the memorandum, is correct.

The judgment of the Circuit Court is affirmed, the other judges concurring.

AUSTIN, vs. WATTS & HUGHES *et al.* (Cross Appeal.)

1. A testator's will contained this clause: "I give, and bequeath to my daughter, M. J., two negro girls, (naming them,) and after the death of my wife, my said daughter, M. J., to have \$800 worth of property." The residuary clause was as follows: "All the rest and residue of my personal estate whatsoever and wheresoever, of what kind and quality soever the same may be, and not herein before given and disposed of, after the payment of my debts, legacies and funeral expenses, I give and bequeath to my wife, A. P., her executors, administrators and assigns, to and for their own use and benefit absolutely." The executors, after having paid the debts and specific legacies, had in their hands, undisposed of, property more than sufficient to pay the \$800 to M. J., which they delivered over to the widow of the testator. *Held*, this discharged the executors from all liability to M. J., it being the intention of the testator that the property *in specie* should be enjoyed by the widow during her life. But the property, in the hands of the widow, and of those purchasing from her with notice, if not without notice, was liable to the payment of the \$800 legacy. As against M. J. each and every portion of the property in the hands of purchasers was charged with the whole amount of her legacy, if it was worth so much, although, as between different purchasers, contribution might be enforced.

Appeal from Howard Circuit Court.

This was a bill in equity, filed by Mary J. Austin, daughter of Garret Austin, deceased, against her father's administrators, B. Watts and R. Hughes, and against S. C. Major and G. Patrick, who had purchased from the testator's widow three slaves belonging to the estate, praying a decree for a legacy of \$800, left her in her father's will, and that it might be paid by the administrators, or by the purchasers of the property, and for general relief.

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Garret Austin, the father, made his will in March, 1839, and died shortly afterwards. The provisions of the will are stated in the opinion of the court. The will was proved in Howard county, and the defendants, Watts & Hughes, were appointed administrators with the will annexed. The wife survived the husband several years, and died a few months before the filing of this bill. Long before the death of the widow, the administrators had paid all the debts and legacies, except the plaintiff's \$800 legacy, leaving in their hands undisposed of \$87 in cash, and three slaves valued at \$950, all of which they delivered over to the widow. About the year 1840, G. Patrick purchased of the widow two of the slaves, and in 1841, S. C. Major purchased the third, and sold her to some person unknown to the plaintiff, who removed her out of the state. Both Patrick and Major knew, when they purchased, that the slaves belonged to Garret Austin's estate, and were charged with the plaintiff's legacy. The above are substantially the facts, as admitted in the pleadings or proved on the hearing.

The court decreed to the plaintiff her legacy, with interest from her mother's death, to be paid by the defendants, Watts & Hughes, and dismissed the bill as to Patrick and Major. Watts & Hughes appealed from the decree against them, and the plaintiff appealed from so much of the decree as dismissed the bill as to Patrick and Major.

P. R. Hayden, for Watts & Hughes, Patrick & Major.

1. The \$800 was not a vested legacy. It was not the intention of the testator that the complainant should have \$800, unless there were that amount of his property or estate remaining undisposed of at the death of his wife. She had the disposal of it as absolute owner while she lived. As to vested legacies, and legacies not vested, see 4 Bac. Abr. 373, and authorities there cited. 3 Vesey, jr., 536, 543-4. 5 ib. 513-14. 2. If the first position be not correct, then at least the widow was entitled to the possession of the property while she lived, and the administrators were not only justified, but did right, in delivering possession to her, after payment of debts,

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specific legacies, and expenses of administration. 3. No trust in favor of the complainant is impressed upon the negroes in the hands of the purchasers from the widow, because they purchased without notice. They were not bound to take notice of the will of the testator, and if they were, it showed that the widow was entitled to the entire residuum of the estate, and they had a right to conclude that the negroes were of that residuum. Again, the property is not so described and identified in the will, that a lien or trust could attach to it in favor of the complainant. 2 Story's Eq. §1070-1-2-3-4, and notes. *Ib.* §1394. *Constantine v. Constantine*, 6 Ves. 102. 10 Ves. 535-6-7. 4. If the defendants or any of them are liable as trustees for the legacy sued for, a demand was at least necessary.

A. Leonard, for Mary J. Austin. The legacy now sought to be recovered is admitted to be a valid legacy. It is a general, not a specific legacy. It is payable out of the general estate, *after* the payment of the specific legacies. It is not a reversionary interest in property, to take effect after the expiration of a life estate, but a legacy payable in future, with a residuary bequest to the widow. The widow is the *residuary* legatee, but by the proposed construction, the plaintiff in effect becomes such. The payment of this legacy is a legal obligation upon the *executors*, and the legal title to the property is cast upon them for this purpose.

The debts and legacies are a charge, in equity, upon the estate, and this is so because it is the legal duty of the executors to apply the estate to that purpose. The equitable charge springs from the legal obligation of the executors to use the property in that way, and, of course, is co-extensive with their obligation. If they are bound to pay the whole legacy, as long as there is property for that purpose, the charge exists, too, for the whole legacy, as long as there is any property subject to the charge. This charge, like all other charges and liens, is not spread evenly over the whole mass, so that each part is responsible *only* for its due proportion, but every part, so far as

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the creditors and legatees are concerned, (although it is otherwise among several owners, who have acquired the property subject to the charge,) is liable for the whole.

The plaintiff, then, had two remedies for her legacy—the legal obligation of the executors to pay it, and the remedy in equity, to enforce the charge against the property.

What now was the legal effect of the act of the executors in delivering the property, after payment of debts and specific legacies, into the possession of the widow, as the residuary legatee? Did it transfer the legal title, or did the executors retain the title, and merely allow her the use of the property until they needed it to pay the plaintiff's legacy? If they parted with the title, they made themselves liable. It is true, if the title did pass, the charge against the property, for the payment of the legacy, followed the legal ownership of the property into the hands of the widow, and purchasers from her with notice; and if the legacy can be satisfied out of the property, as that is the fund primarily liable, and is before the court to be decreed against, the executors may be discharged, not because they are not liable, but because what they were bound to see paid, can be paid without delay or inconvenience, out of the property primarily applicable to that purpose; and the purchasers cannot complain; they took the property with notice of the trust—with notice, in legal contemplation, that every part of the property was liable for the whole legacy—not as a mere security, but primarily, as the true, original and only debtor.

If, however, the executors did their duty and retained the title to pay the plaintiff's legacy when it fell due, the property is liable in the hands of purchasers, notice or no notice, and to the same extent that it would be liable in the hands of the executors. And so, in either event, the plaintiff is entitled to her whole legacy, without any abatement, either from the executors or the purchasers.

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RYLAND, Judge, delivered the opinion of the court.

1. In this case, the first matter to be attended to is to discover the real intent of the testator, in the disposition of his property by will. He first makes bequests to his daughter and grand-daughter, and then gives the residue of his estate to his wife. This is the substance of the whole will. The provision made for the complainant is in these words: "I give and bequeath to my daughter, Mary Jane, two negro girls, one named Margaret and the other Gabriella, and after the death of my wife, my said daughter, Mary Jane, to have eight hundred dollars worth of property." The provision for the grand-daughter is in these words: "I give and bequeath to my grand-daughter, Mary Jane, daughter of Nathan Pulliam and Lucy Ann Frances Pulliam, when she becomes of age, one negro girl named Rachel." The provision for the widow is in these words: "All the rest and residue of my personal estate whatsoever and wheresoever, of what kind and quality soever the same may be, and not herein before given and disposed of, after the payment of my debts, legacies and funeral expenses, I give and bequeath to my wife, Ann P. Austin, her executors, administrators and assigns, to and for their own use and benefit absolutely."

These three clauses constituted the whole will. After the settlement of the estate by the executors, and the payment of the debts of the testator, there remained in the hands of the executors three slaves—one a woman of forty years, with her child of some four years old; the third, a boy, of about fifteen years of age, and money to the amount of eighty-seven dollars. These slaves and the small balance of money were delivered by the executors to the widow. She lived for several years after having received the property, and during her life the slaves were sold, either by her or for her debts; the defendants, Major and Patrick, being the purchasers. This bill is brought against the executors, Hughes and Watts, on the ground that they are personally responsible for the legacy of

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eight-hundred dollars, given by the will to the complainant, and Major and Patrick are made defendants as purchasers of the slaves from the widow, with notice of the complainant's rights, and responsible to satisfy her legacy, if the executors are not bound.

We must, in this case, as in all other cases of wills, ascertain the intent of the testator, and, as far as may be consistent with the rules of law, carry that intent into effect. For this purpose, we look at the whole instrument together, and regard the whole as one volition of the testator's mind, in which the last clause of the will was as much involved and as necessary to his intent as the first; and, where there is not an absolute repugnance between two clauses, both are to have effect.

If, in the bequest to his daughter, the intent of the testator was to give her not only the two slaves, but also the \$800, as a present legacy, which was to be delivered over to her at her mother's death—the time of its payment being only postponed—then it would be difficult to avoid the conclusion, that it was the duty of the executors so to retain and secure the amount of it, that it would be certain to the legatee, when the mother died, and that they would be liable to her for the amount of the legacy, immediately upon the death of the mother. But it is to be remarked, that this legacy is not a legacy of money; it is \$800 worth of *property*; this, evidently, means property which belonged to the testator, and therefore it is in the contemplation of the testator that the property would remain in specie at the mother's death. The daughter is to have, after the death of the mother, \$800 worth of property: the property is not now ascertained, nor is property, at present having the value of \$800, to be set apart to answer this legacy, but the value is to be ascertained after the death of the mother. When speaking of the slaves bequeathed to the daughter in the same clause, the language used is: "I give and bequeath to my daughter." When he speaks of the \$800 worth of property, he says: "After the death of my wife, my said daughter to have \$800 worth of property." The difference

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in the words employed in reference to the two subjects, in the same sentence, furnishes some evidence that the testator did not intend to give to the daughter a right in the property mentioned in the latter part of the sentence, which would require its present appropriation for her benefit. When we turn to the residuary clause in favor of the wife, which is drawn in strong and comprehensive language, and which, from its structure, would appear to be the principal provision of the will, we find that the testator gives to his wife "all the residue of his personal estate, not herein before given and disposed of, after the payment of his debts, legacies and funeral expenses." The estate of this testator appears, from the record, to have consisted of some five negroes, besides those given to the daughter and grand-daughter, and some stock, household furniture, &c. Two of the slaves, together with the stock, furniture, &c., were sold for the payment of debts; and, upon a settlement of the administration, there remained in the hands of the executors \$87, which, with the remaining slaves, valued at \$950, constituted the residue of the estate. This reference is made to the condition of the estate, as allowable in some cases, to aid in the construction of a will; and by it, we see that, if the \$800 was to be provided for and secured by the executors, out of the residue, after the payment of debts, before the widow should receive any thing under the will, then the clause of the will which is drawn with most care, and apparently designed to be very comprehensive, will almost entirely fail of making any provision for the widow. The testator evidently designed to make a present disposition of all of his property. He gave to his daughter and grand-daughter the slaves named in the will: he provides that his daughter shall, after the death of her mother, have a portion of his property, which shall then be worth \$800. He gives all the residue of his property, not given or disposed of before, to his wife, subject to the payment of his debts and legacies. It is believed that the proper construction of this will is, to regard the clause relating to the \$800, as intended by the testator to be satisfied out of

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the residuum bequeathed to the mother ; so that all the residuum, after the slaves given to the daughter and granddaughter are delivered to the legatees, shall be held to pass to the mother, subject to the payment of the debts, and the sum of \$800 to be received by the daughter at the mother's death. This construction allows the mother to have the enjoyment of the residuum during her life, without any claim thereon by the daughter, while it gives to the daughter what the testator designed she should have, property of a certain value, at her mother's death. It charges the \$800, for the benefit of the daughter, upon the property bequeathed to the mother, so that it shall ultimately be safe to her, while the mother shall have the enjoyment of the whole residue. The daughter's claim is not a title to any specific articles of property, but is a charge upon the whole residuum.

This is not regarded as a bequest of a life estate, with remainder over ; for here there is no specific property in which the daughter has a remainder, and none in which, by the terms of the will, a life estate is given to the mother. If such had been the nature of the provision, it may be admitted to be the law that, where a residuum is bequeathed for life, with remainder over, if the property is perishable, or diminishing in quantity and value, it is the usual practice to sell the property and vest the proceeds, so as to give the interest only, to the tenant for life. *Gibson v. Botts*, 7 Ves. 89. *Fearns v. Young*, 9 Ves. 552. *Williams on Executors*, 1196. *Alcock v. Slop-er*, 2 M. & K. 699. But this rule is not pursued, where it is the apparent intention of the testator that the property shall be enjoyed in the state in which it exists. *Pickering v. Pickering*, 2 Beav. 31. Where personal chattels are bequeathed to A., with remainder to B., A. will be entitled to the possession of the goods, upon signing a receipt, expressing that he is entitled to them for life, and that afterwards, they belong to B. *Slanning v. Style*, 3 P. Wms. 336. *Leek v. Bennett*, 1 Atk. 471.

In the present case, as the provision for the daughter is re-

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garded as designed merely to create a charge on the residue bequeathed to the mother, the executors did not make themselves liable to the complainant, by delivering the property which was subject to this charge, to the widow ; and therefore, the decree against them is reversed.

But the purchasers of the property, who, according to this record, took it with notice of this charge, are liable to the complainant for the amount of the legacy. It is not designed to decide the question, whether a purchaser from the widow of property which was subject to this charge, would only be bound by notice ; but in this record, the notice of her title is sufficiently shown to have existed, and therefore, the purchasers are held liable, without discussing how far proof of notice was necessary. In the next place, it is necessary to determine how far these purchasers are liable to the complainant, and upon this point, there was a rule adopted in the outline of the opinion filed at the time judgment was rendered, which, upon more mature reflection, is believed to erroneous. It was there stated as the rule, that the purchasers were to contribute to satisfy the legacy, in the proportion that the property they purchased bore to the whole residuum which came to the hands of the widow.

The rule, which, upon further reflection, we think the correct one is, that, as against purchasers of portions of the residuum, which are together equal to the whole amount of the legacy, the complainant is entitled to her whole legacy, with interest from the mother's death. So far as the different defendants are purchasers of different portions of the property from the widow, at different values, they must account for their relative proportion of the amount to be paid to the complainant, according to the value of the part so held by each of them ; and if the whole value of all the parts so purchased by the defendants, is equal to the amount of \$800, at the mother's death, the defendants, Major and Patrick, must pay the whole amount, with interest from that time. The amount of their respective purchases appears to be greater than the amount of the com-

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plainant's charge, and therefore, they must pay the whole ; but between themselves, the proportion is to be ascertained by an account to be taken, to show the amount for which each is liable.

The decree of the Circuit Court is reversed, and the cause is remanded, with directions to that court to dismiss the bill, as to the defendants, Hughes and Watts, and to render a decree against the defendants, Major and Patrick, in favor of complainant, for the sum of \$800, with interest from the death of her mother, as against each defendant, in proportion to the amount of their respective purchases, with the concurrence of the other judges.

POMEROY'S ADMINISTRATOR, Plaintiff in Error, vs. BROWN
& DURLEY, Defendants in Error.

1. Where a party who was sued upon a note filed a plea of the general issue with notice of off-set, and two terms afterwards was allowed to file an amended plea with affidavit, denying the execution of the note, the supreme court refused to interfere with the discretion exercised by the circuit court in allowing the amended plea.

Error to Pettis Circuit Court.

Napton, for plaintiff in error. The amendment at this stage of the proceedings, and after the death of Brown, the principal, (the defendants being his securities,) was not in furtherance of justice. The discretion of the Circuit Court is not an arbitrary one. The case of *Caldwell v. McKee*, 8 Mo. Rep. 334, explains fully the position of this court upon cases of this character. The cases hitherto have been cases where the decision of the Circuit Court would only affect the costs or the time of trial. Here is a case where the recovery may be barred forever by the death of a witness. The defendants were estopped on the record by their first plea, which virtually admitted the

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execution of the note. *P. Hayden and Adams*, for defendants in error. The discretion of the Circuit Court was soundly exercised, and this court will not disturb its action. 8 Mo. Rep. 334.

GAMBLE, Judge, delivered the opinion of the court.

This suit was commenced in 1849. At the October term in that year, the defendants, and others who were with them, original defendants in the action, craved oyer, and demurred, and at the same term withdrew their demurrer, and pleaded the general issue, with notice of set-off filed by one of the other defendants. The cause was continued from term to term, until the April term, 1851, when the death of James Brown, one of the original defendants, and the principal in the note sued upon, was suggested, and the cause continued. At the October term, 1851, the cause was continued at the instance of the plaintiff, after which, at the same term, the defendants asked leave to file an amended plea accompanied by an affidavit, denying the execution of the note upon which the suit was founded. The leave was given—the plea and affidavit were filed, and the plaintiff excepted to the action of the court. At a subsequent term, there was a trial, which resulted in a non-suit, because the plaintiff did not prove the execution of the note. The error complained of, is the granting leave to file the amended plea at the time, and under the circumstances under which it was given.

1. In *Caldwell, Adm'r v. McKee*, 8 Mo. Rep. 334, this court was called upon to revise the discretion of the Circuit Court in refusing to allow an amendment; and in the opinion given in that case, there is a very plain intimation that, as amendments are to be allowed or refused in the exercise of the discretion of the circuit courts, and as those courts are to be regarded as competent to exercise that discretion soundly, this court will not interfere with their action, except in cases in which justice to the parties very obviously demands such interference.

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In this case, we are not apprised by the record of any other objection to allowing the amendment, than that the parties had, for a long time, stood upon their general issue, without denying the execution of the note, and that two of the original defendants had died. The bill of exceptions taken to the allowing the amendment, shows no fact which will authorize us to disturb the action of the Circuit Court.

The judgment of the Circuit Court is, with the concurrence of the other judges, affirmed.

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SWARTZ *et al.*, Respondents, *vs.* CHAPPELL, Appellant.

1. A bill of sale stated that A. "sold and passed" to B. a quantity of hemp. *Held*, the title passed, notwithstanding the bill of sale provided that A. was to perform certain labor to prepare the hemp for market.
2. Where the inferior court gives erroneous instructions, the supreme court will not review the evidence, in order to determine whether the judgment is not for the right party upon all the facts.

Appeal from Saline Circuit Court.

Napton, for appellant. The Circuit Court erred in instructing the jury that no title to the hemp passed by the bill of sale.

A. Leonard, for respondents. 1. The agreement passed no title to the hemp. By the terms of the agreement, acts were to be done, in order to complete the sale and pass the property. 2. There was no delivery of the hemp, and as against an attaching creditor, delivery is essential to pass the property. *Lanfear v. Sumner*, 17 Mass. 112. *Parsons v. Dickerson*, 11 Pick. 353. 3. Even if the court erred as to this point, the error has not prejudiced the defendant, and so is no ground for reversing the judgment. The evidence shows the bill of sale to be a palpable fraud, and the jury have so found. If it was fraudulent in part, it was fraudulent *in toto*. The

hemp and oxen being embarked in the same bottom, must share the same fate.

GAMBLE, Judge, delivered the opinion of the court.

Swartz & Swartz sued Geagen & Geagen, and caused an attachment to issue, which was levied upon a quantity of unbroken hemp, and upon two yoke of oxen. Chappell interpleaded, claiming the property attached as his.

On a trial of this claim of property, Chappell gave in evidence a document under seal, executed by the defendants, Geagens, in which it was declared that, in consideration of a quantity of four tons of hemp, sold and passed by them to Chappell, and for the consideration of two yoke of oxen sold, passed and delivered by them to Chappell, he engaged to take them to California, supply them with provisions by the way, and furnish them with provisions for three months after their arrival there. The Geagens contracted to complete the breaking of the hemp, and to have it well broken, baled and ready for market by the first of April then next.

The plaintiffs gave evidence to show that this agreement between Chappell and the Geagens, was made in fraud of their creditors.

The court gave to the jury two instructions, the first relating to the hemp, and the second to the oxen. The first is in these words :

“The court instructs the jury, that the interpleader, Chappell, acquired no title to the hemp described in the written contract read in evidence by the interpleader, by said contract, as against the plaintiff in this action.”

The other instruction was a proper instruction, upon the question, whether the transfer to Chappell was intended to defraud the creditors of the Geagens.

1. The first instruction presents the point upon which the case has been argued in this court, and in support of the instruction, it has been insisted that the property in the hemp was

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not passed to Chappell, because the Geagens were, by their contract, to perform certain labor on it, to prepare it for market. But it is evident that the title to it might pass, in the condition in which it then was, although they should be still bound by contract to perform labor on it; and the language of the bill of sale is such as to show that the title was intended to pass immediately upon the execution of the instrument. The words are, "sold and passed to the said Chappell, by the said Patrick and Thomas, at the signing and sealing of this agreement." In 1 Bac. Abr. 527, it is said, "a bill of sale is a solemn contract, under seal, whereby a man passeth the right or interest that he hath in goods and chattels; for, if a man promise to give any chattels without valuable consideration, or without delivering possession, this alters no property, because it is *nudum pactum*; but if a man sell goods by deed under seal duly executed, this alters the property between the parties, though there be no consideration, or no delivery of possession, because a man is estopped to deny his own deed." Between the parties, the instrument, under their seals, would pass the title, if such was the intent, and here the language indicates their intent that it shall pass immediately. The subsequent agreement of the Geagens, to complete the preparation of the hemp for market, is not inconsistent with the present ownership of Chappell. If, between the parties, the title passed, the plaintiffs, who are creditors of the Geagens, can only reach the property, by showing that, as to them, the sale is fraudulent. They satisfied the jury of that fact as to the oxen, and might have done so as to the hemp, by the same evidence, if the instruction had not taken from the jury all consideration of the interpleader's right to the hemp.

There is no section of the statute in relation to fraudulent conveyances, which appears to authorize this instruction, and no such ground has been taken in the argument of the case.

2. It has been insisted that, as the jury found against the interpleader in relation to the oxen, and as the controversy about them involved the question, whether the conveyance was

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fraudulent, the same would have been the finding in relation to the hemp, if that question had been left to them, as the hemp and oxen formed together but one consideration, for one side of the contract, and therefore the judgment ought not to be disturbed.

But this position would require this court, in all cases where an error was committed on one question in the Circuit Court, to look into the whole evidence, and determine whether, notwithstanding such error, the judgment ought to stand, because it is consistent with our views of the right of the cause, as appearing from the whole evidence. In other words, this court would try the case upon the facts, to determine whether an error in law should be corrected. In this case, the issue was, whether the property seized was subject to the attachment. If a distinct issue had been made upon the record, whether the bill of sale was fraudulent as to one of the subjects conveyed, and that issue had been found for the plaintiff, there would have been force in the position that, as the verdict of the jury determined the question of fraud, by directly responding to the issue, we would assume that to be a fact upon which the whole instrument might be declared void. But we cannot look into the evidence to ascertain the questions of fact litigated between the parties, and the strength of the evidence given on each side, in order to determine whether we will correct an error committed by the court.

The judgment is, with the concurrence of the other judges, reversed, and the cause remanded.

BARRY COUNTY, TO THE USE OF THE STATE SCHOOL FUND,
Plaintiff in Error, *vs.* MCGLOTHLIN *et al.*, Defendants in
Error.

1. Suit may be maintained in the name of a county upon a note payable to the county to the use of the state school fund.

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Error to Barry Circuit Court.

Action on a note payable to Barry county, to the use of the state school fund. The cause of demurrer assigned was, that the county could not sue for money belonging to the school fund, and so the suit was brought in the name of the wrong party.

Gardenhire, for plaintiff in error. The note, on its face, imports a consideration. A note payable to a county vests in the county all the rights which would be vested in an individual by a note payable to him. R. C. 1845, p. 289, sec. 3. 12 Mo. Rep. 97. If the note does not conform to the school law, it is nevertheless a good common law security. 10 Mo. Rep. 666. The demurrer admits the execution of the note to Barry county, and for a consideration.

GAMBLE, Judge, delivered the opinion of the court.

Barry county filed a petition against the defendants, alleging that they made their promissory note, by which they promised, for value received, to pay to plaintiff the sum of seventy-three dollars and fifty cents, twelve months after date, which amount, with the interest, remained unpaid. The defendants demurred to the petition, and the demurrer was sustained, and judgment for the defendants.

1. The note appears, by the petition, to have been made payable directly to Barry county, and, although there may be a duty to apply the money in a particular manner, or to a particular object, the promise by the note being to Barry county, the suit was properly brought in the name of the county. The act which enables counties to make contracts, (R. C. 289,) provides in the third section, "that all notes, bonds, bills, &c., whereby any person shall be bound to any county, or to the inhabitants thereof, or the governor, or to any other person, in whatever form, for the payment of money or any debt or duty, or the performance of any matter or thing, for the use of any

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county, shall be valid and effectual to vest in such county all the rights, interests and actions which would be vested in any individual, in any such contract made directly to him."

Although there may be no statute directing the execution of a note in the form here used, for the indebtedness it was designed to secure, yet it is good on its face, as it imports a consideration. The demurrer should have been overruled, and therefore the judgment is reversed, and the cause remanded.

YOUNG, Respondent, vs. CAMDEN COUNTY, Appellant.

1. The fourth and fifth sections of article three of the act concerning county treasuries, (R. C. 1845,) prescribing the form of county warrants, are merely directory. A departure from the form prescribed is no defence to an action on the warrant.

Appeal from Camden Circuit Court.

Gardenhire, for appellant. The instrument sued upon as a warrant is not written or printed in Roman letters without ornament, nor is it in the form prescribed by statute, and the county court had no authority to issue it.

Parsons, for respondent. The statute prescribing the form of county warrants, and prohibiting the use of ornaments, is merely directory.

GAMBLE, Judge, delivered the opinion of the court.

Young commenced a civil action against Camden county, upon a county warrant. The county demurred to the petition, and the demurrer was overruled, and judgment was given for the plaintiff.

1. The county insists that the demurrer ought to have been sustained, because the warrant was printed upon paper with ornaments at one or both ends, when the act regulating county

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treasuries, (R. C. 311, sec 5,) requires that county warrants shall be written or printed in roman letters, without ornament, and also because the warrant, in addition to the words which are contained in the form given in the fourth section of the same act, contained other words of contract.

The provisions of the act which have been relied upon by the counsel for the county, are directory to the county courts in issuing warrants, and the chief design of those enactments was, to prevent the making of paper by county courts which could be used as a circulating medium, having the appearance of ordinary bank paper. When a party, like the present plaintiff, has performed labor, or rendered services to the county, and holds a warrant issued upon the treasury of the county by the county court, his claim to the money is not affected by the taste of the court in ornamenting their warrants, although they are forbidden to use such ornaments by the act. The words of the warrant have the same meaning, and import the same obligation, whether the ends of the paper upon which it is printed have ornaments or not.

And so as to the other point, the insertion of other words in the warrant, beside those in the form, as in the present case, containing stipulations about interest, if the principal was not paid, do not vitiate the warrant. The words prescribed by the statute are there, and the other words do not destroy their effect.

The demurrer was properly overruled, and the judgment is, with the concurrence of the other judges, affirmed.

ANDRAE, Plaintiff in Error, *vs.* HEINRITZ, Defendant in Error.

1. Under the act (R. C. 1845) a complaint for an unlawful detainer, which states that the plaintiff is entitled to the immediate possession of the premises, and that the defendant unlawfully detains the same, is insufficient.

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Error to Cole Circuit Court.

This was an action of unlawful detainer, begun before a justice of the peace. The substance of the complaint is stated in the opinion of the court. It appeared from the evidence that the plaintiff bought the premises of one Rauchelbach, and that, at the time of the purchase, the defendant was in possession of them by permission of Rauchelbach, under a verbal agreement to enter into a written contract containing certain stipulations; and that the defendant refused to enter into the contract with the plaintiff after he had bought the premises. There was evidence tending to show that the defendant verbally accepted the plaintiff as his landlord. The plaintiff took a non-suit upon the refusal of the court to declare the law as asked by him.

Parsons, for plaintiff in error. If a tenant attorns to a stranger with the consent of the landlord, the stranger can maintain unlawful detainer upon the failure of the tenant to comply with the terms of the contract for letting.

Gardenhire, for defendant in error. 1. The vendee of a landlord cannot maintain unlawful detainer without having once been in possession. *Holland v. Reed*, 11 Mo. Rep. 605. 7 Mo. Rep. 50. 8 ib. 276. 2. The complaint is insufficient.

GAMBLE, Judge, delivered the opinion of the court.

1. The complaint filed with the justice in this case charges that, on a certain day, the plaintiff was entitled to the immediate possession of certain premises (describing them) and so continued entitled until the exhibition of his complaint, and that the defendant unlawfully detained and still unlawfully detains the premises.

The third section of the act concerning forcible entries and detainers, (R. C. p. 512,) gives the remedy for unlawful detainer in two cases. The first is, where a person shall wilfully and without force hold over after the termination of the time

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for which the premises were demised or let to him or the person under whom he claims. The second is, where a person wrongfully, and without force, by disseisin, shall obtain and continue in possession of any premises, and after demand made in writing for the possession by the person having the legal right to the possession, shall refuse or neglect to quit such possession.

It is obvious that the complaint in the present case, which is for an unlawful detainer, does not contain allegations bringing the case within the statute. It is much like a declaration in an ejectment under our statute, but not at all a compliance with the statute concerning forcible entries and detainers. Whether, then, the plaintiff was properly nonsuited or not, he is not entitled to recover upon his complaint, and therefore, it would be useless to pass upon the questions which arose at the trial. The judgment is, with the concurrence of the other judges, affirmed.

STEEL, Defendant in Error, *vs.* BROWN, Plaintiff in Error.

1. A bill of sale stated that B. had sold to S. "a negro woman named Lucy, for a slave during life, aged forty-one or two years, *stout and healthy.*" Held, the words "*stout and healthy*" constituted a warranty of soundness.

Error to Saline Circuit Court.

Action on an alleged warranty of soundness in the sale of a slave. The defendant denied the warranty, but insisted that the slave was sound. There was a trial by jury, conflicting evidence on the question of soundness, and a verdict for the plaintiff. The bill of sale was in these words:

"January 6, 1852.

"I, James B. Brown, have this day bargained and sold to Mr. Joseph B. Steel, a negro woman named Lucy, for a slave during life, aged forty-one or two years, stout and healthy, for the sum of three hundred dollars. in bonds paid in hand.

"JAMES B. BROWN."

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The bill of sale was the only evidence of warranty. The court directed the jury that the words "stout and healthy" in the bill of sale, constituted a warranty of soundness, and that this was a question of law for the court, and not a matter for the jury. The defendant brings the case here by writ of error.

A. Leonard, for plaintiff in error. 1. At common law, the seller of personal property is not liable for the soundness of the thing sold, unless there be fraud or an express warranty. *Chandler v. Lopus*, 1 Smith's Leading Cases. *Parkinson v. Lee*, 2 East, 314. *Moses v. McFarland*, 9 Watt, 55. *Seixas v. Wood*, 2 Caines, 55. *Moses v. Mead*, 1 Denio, 385. *Emerson v. Brigham*, 10 Mass. 207. 2. Although no particular words are necessary to constitute a warranty, yet it must appear that the seller intended to make himself responsible, if the thing sold were different from what he represented. A mere affirmation of a fact, without any thing more, is neither a warranty, nor any evidence of a warranty. It is not an agreement nor evidence of an agreement. Same cases cited above. *Sweet v. Colgate*, 20 J. R. 203. *Foster v. Caldwell*, 18 Vt. Rep. 176. *Soper v. Breckinridge*, 4 Mo. Rep. 14. *Smith v. Miller*, 2 Bibb, 616. *Bacon v. Brown*, 3 Bibb, 35. 3. If a mere affirmation must be taken *prima facie* as a warranty, yet here, from the very nature of the subject, the affirmation cannot be any thing more than a mere representation of the seller's opinion. That the slave was sound could only be matter of opinion and not of positive knowledge. If he *knew* she was unsound, he is liable for deceit.

Hayden, for defendant in error. The bill of sale contains an express warranty. The word "warranty" was not used, nor is it necessary. If the statement that the slave was "stout and healthy" formed a part of the contract, then it was a warranty. That it did form a part of the contract is evident. 1 Smith's Leading Cases, 229, and authorities there cited.

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RYLAND, Judge, delivered the opinion of the court.

1. The only question in this case arises on the construction of the bill of sale of Brown to Steel for the negro woman. This bill of sale is as follows: "January 6th, 1852. I, James B. Brown, have this day bargained and sold to Mr. Joseph B. Steel, a negro woman named Lucy, for a slave during life, aged forty-one or two years, stout and healthy, for the sum of three hundred dollars, in bonds paid in hand. James B. Brown."

There are no particular words necessary to be used in order to constitute a warranty. If, in this case, the statement in the bill of sale, that the negro woman was "stout and healthy," formed a part of the contract, then it is a warranty. The vendor here says, I have sold to Joseph B. Steel, a negro woman "for a slave," "during life," "stout and healthy." Is there, or can there be a doubt that the statement in the bill of sale "for a slave during life" is a warranty of servitude? Does not the phrase, "for a slave during life" enter into and make part of the contract? The negro woman is sold for a slave during her life—Brown sells her to Steel as a slave for life—the duration of servitude forming a part of and entering into the contract of sale. There can be no doubt of this. Now let us examine this bill of sale a little further. The negro woman is sold "for a slave during life," "stout and healthy;" now this last phrase, "stout and healthy" forms a part of the contract, as much as the one just preceding it, concerning servitude. Brown sells her, not only as a slave during life, but sells her as a slave, "stout and healthy." He sells the woman for a slave, stout and healthy. Ask the question, what kind of a slave did Brown contract with Steel for; and, from the words used in the bill of sale, it becomes obvious that the woman sold was not only a slave during life, but was a stout and healthy slave. She was sold as well "for a stout and healthy slave," as she was for a "slave during life."

This bill of sale, then, contains a warranty of soundness. Such being the opinion of this court, it becomes useless to refer to and examine the various authorities in regard to "affirmations" and "representations" in contracts for personal property.

In the case of *Soper v. Breckinridge*, 4 Mo. Rep. p. 14, the bill of sale was as follows: "For and in consideration of the sum of two hundred and sixty-seven dollars and fifty cents, I have this day sold unto Benjamin Soper, one negro girl named Dinah, sound in body and mind, and slave for life. I bind myself to warrant and defend the right and title of said negro from all and every person or persons whatsoever. Given under my hand this 7th day of September, 1833. Signed, Eddy L. Breckinridge." This court, in delivering its opinion, cited the case from 2 Bibb, 616—*Smith, for the benefit of Norton, v. Miller*. This Kentucky case had the following as the contract of sale: "Received of William Smith, of Lexington, three hundred dollars, for a negro boy named Abram, which negro is sound and healthy, and I warrant the title of said boy against the claim or claims of any person whatsoever, as witness my hand," &c. The court of appeals of Kentucky, in its opinion, says: "It becomes necessary to enquire whether the writing produced is an undertaking on the part of the appellee, that the negro was sound and healthy. That the appellee did not intend warranting the negro sound, we think evident from the writing. It contains an acknowledgment of the receipt of the money for which the negro was sold, a representation that he was sound, and an express warranty of title. Had the appellee intended to warrant the negro sound, it is most reasonable to suppose the warranty would have been so worded as to embrace it. This not having been done, evinces, clearly, an intention to warrant the title only." After quoting as above, from the case of *Smith v. Miller*, this court proceeded thus: "This is precisely what we think in the present case. The vendor has manifested a purpose to warrant the title, about which he could know and judge correctly, and

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of which the vendee may reasonably be supposed to know nothing ; whilst, in regard to the health of the negro, which the vendee had the means of ascertaining, and of which he might have judged as well or better than the vendor himself, he makes a simple statement, or affirmation, if you will, in which the vendee might or might not have confided. The intention of the parties, in every such case, should govern, and prove the distinction taken between the health and condition of the negro and the title, and the express warranty of the title. We feel concluded from inferring, from the first clause of the bill of sale, an agreement to warrant the girl sound in body and mind, &c. No particular phraseology is requisite to constitute a warranty ; any representation of the state of the thing sold, or any direct or express affirmation by the vendor, of its quality and condition, and *showing an intention to warrant* its soundness, will be sufficient. But in this case, the intention is not left to be inferred, (as we think) from the affirmation that the girl was sound in body and mind, but is *shown clearly* by the clause of warranty applied to the title as before stated." In this case of *Soper v. Breckinridge*, Judge McGirk, the ablest lawyer on the bench, at that time, differed from his brethren, about the warranty. He said: "I am of opinion, that the words contained in the bill of sale do amount to a warranty, as much as if the seller had said, 'I warrant, or I promise the slave is sound.'"

Applying the rule of construction as laid down by this court, in the case of *Soper v. Breckinridge*, and the principles therein maintained, and that case is an authority for pronouncing that the bill of sale, in this case, now before the court, contains a warranty of soundness of the negro woman ; and such is the unanimous opinion of this court.

The judgment of the court below is affirmed accordingly.

Dameron's Adm'r v. Dameron.

DAMERON'S ADMINISTRATOR, Plaintiff in Error, *vs.* DAMERON,
Defendant in Error.

1. The proceeding under sections 9, 10, 11 and 12, of article 2 of the act concerning administration, is not applicable, where the party detaining the effects has parted with the possession before complaint filed.

Error to Randolph Circuit Court.

This was a proceeding founded upon sections 9, 10, 11 and 12, of article 2 of the act concerning administration, (R. C. 1845,) commenced in the county court against the defendant for concealing and embezzling effects belonging to the estate of the plaintiff's intestate. On the trial, it appeared that, if the defendant ever had any effects belonging to the estate in his possession, he had parted with the possession before the institution of this proceeding, and the court instructed the jury that, if such was the case, they could not convict him. The plaintiff appealed.

J. Davis, for appellant, contended that the proceeding under the statute was applicable, whether defendant had parted with the possession or not.

Clark, for defendant in error, was stopped by the court.

GAMBLE, Judge, delivered the opinion of the court.

1. The proceeding under the ninth and subsequent sections of the second article of the administration act, which is designed to compel the surrender of the effects of deceased persons to the executor or administrator, is an extraordinary remedy, which is not to be employed in other cases and for other purposes than those which are clearly within the act. The person charged with concealing or embezzling the effects is to be cited before the county or probate court, examined on oath and compelled to answer. If he denies the right of the executor or administrator to the property or effects in his possession, the

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right is to be tried in a summary manner. If, upon the examination or trial, the person charged is convicted of *unlawfully detaining* the effects, the court may compel the delivery thereof by attachment. (R. C. 74, 75.)

All other remedies for the recovery of the effects from the hands of the person detaining them, were open to the executor or administrator, when this provision was made in the administration act, and were not affected by the act allowing this remedy. It was intended, in a summary manner, without expense or delay, to take from a person embezzling or concealing the effects of a deceased person, the articles actually in his possession, and turn them over to the representative of the deceased. The process by which this is to be effected is, to attach the person unlawfully detaining the effects, and to confine him until they shall be delivered, and this is the only mode of rendering the proceeding successful.

It would seem to be quite obvious, as well from the language, as the apparent design of the act, that this proceeding is not to be used where the person charged with unlawfully detaining the effects, has really no possession of or control over them, at the time the complaint is made against him. In such case, the attachment and imprisonment of his person cannot result in the delivery of the articles to the executor or administrator, and the imprisonment, if allowable at all, is allowable for his whole life. At least, it is easy to imagine a case in which a person has had in his possession property of a deceased person, and has so parted with the possession that it is utterly impossible he should ever regain it. If, in such case, he is to be imprisoned until it is delivered, he must be imprisoned for life.

In the present case, it is not doubted that the defendant had parted with the possession of the property which belonged to the intestate, before the commencement of the present proceeding, and therefore, he was not liable to be proceeded against under the administration act.

The judgment of the Circuit Court is, with the concurrence of the other judges, affirmed.

Dickerson v. Apperson.

DICKERSON, Appellant, *vs.* APPERSON, Respondent.

1. In an action against a constable, commenced before a justice, for a false return of an execution, the supreme court refused to disturb a nonsuit taken in the circuit court, it appearing that the execution issued upon an irregular judgment which might have been set aside, and that judgment against the constable was taken before the justice on the return day of the execution without any notice.

Appeal from Moniteau Circuit Court.

Draffin, for appellant.

Parsons, for respondent.

SCOTT, Judge, delivered the opinion of the court.

This case stands upon a nonsuit, and that nonsuit must be confirmed. It was a proceeding against a constable for a false return to an execution under the 23d and 24th sections of the 7th article of the act entitled "an act to establish justices' courts, and to regulate proceedings therein." It appears from the record, that the proceedings were begun on the return day of the execution, without any notice, as required by the statute. Indeed, the whole case is one unheard of before this time. The plaintiff was sued as a surety, together with his principal. On the return day of the writ, the principal did not appear, for he was not served with process. The plaintiff, his surety, appeared, paid the debt for which he and his principal were sued, and then had a judgment entered against the principal for the amount paid by him; so, there was no judgment in the original suit. It is the execution sued out on this judgment, thus obtained, that gives rise to this controversy. Now, although the constable cannot object to the regularity of the proceedings, as the execution, being regular on its face, and issuing from a proper court, was a justification to him in levying it, yet the proceedings were altogether irregular, and might have been set aside. With the same piepoudre court speed, the

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plaintiff, on the return day of his execution, takes a judgment against the constable for a false return to his execution, when the law required at least three days' notice of such a step.

Under these circumstances, as the plaintiff has been nonsuited, that nonsuit will not be set aside.

The court acted correctly, in permitting the papers necessary to an appeal, to be perfected when objections were taken to them, and then overruling the motion to dismiss the appeal. Act concerning justices' courts, 8th art., secs. 13, 15 and 17.

Judge Ryland concurring, judgment affirmed; Judge Gamble absent.

LONG, Appellant, vs. CONSTANT, Respondent.

1. A debt evidenced by a note which is lost may be assigned, so as to enable the assignee to sue in his own name.

Appeal from Buchanan Circuit Court.

Vories, for appellant, contended that, under the new code, the plaintiff might sue in his own name, and relied upon *Walker v. Mauro*, 18 Mo. Rep.

Willard P. Hall, for respondent.

GAMBLE, Judge, delivered the opinion of the court.

Long's petition states, that Constant made his promissory note for \$1300, dated February 10th, 1851, payable sixty days after date, to Henry Russell, or bearer, for value received; that Russell lost the note; that a copy of the note was made, and Russell, upon that copy, on the 25th of August, 1851, assigned the note and the debt of \$1300 thereby secured, to the plaintiff, and that the defendant was notified of the assignment. The defendant demurred to the petition, and the demurrer was sustained.

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1. In *Walker v. Mauro*, 18 Mo. Rep., it was held that, since the adoption of our code of practice, a debt may be assigned, so as to authorize the assignee to maintain an action in his own name. The assignment of the debt in that case, consisted of an order drawn by the creditor on his debtor, in favor of the person who brought the suit. In other cases, it has been held that, where the debt is evidenced by a bond or note, and it is transferred without assignment on it, the action is to be brought in the name of the obligee or payee, because he is a person recognized by the code as a trustee of an express trust. In the present case, by the loss of the note, payable to Russell or bearer, a court of equity would have had jurisdiction to decree payment by the maker to the payee, and would have required an indemnity from the payee.

It is true, that a distinction has been taken between a lost bond and a lost note, upon the ground that, in an action on a bond, oyer could be prayed, and until it was given, the plaintiff could not proceed with his action, and therefore, he might commence his suit in equity; but as oyer was not demandable of a note or other unsealed instrument, the plaintiff might proceed at law, and show the contents of the lost instrument. *Walmsly v. Child*, 1 Ves. 344. 1 Story Eq. sec. 85. But such distinction does not exist here, where the same proceeding is had, in an action on a note, as in an action on a bond; and, indeed, all our civil actions are now suits in equity as much as actions at law. In this case, then, we have a suit upon a note payable to bearer, which has been lost or destroyed, and the payee has assigned the debt to the present plaintiff. By the loss or destruction of the instrument, while in the hands of the payee, he could not assign the evidence of the debt so as to comply with our statute regulating the assignment of bonds and notes, and as he sold and assigned the debt to the plaintiff, the plaintiff may maintain the action in his own name. The demurrer, therefore, should have been overruled.

The judgment is reversed, and the cause remanded, with the concurrence of the other judges.

Coy v. DeWitt.

Coy, Plaintiff in Error, vs. DEWITT, Defendant in Error.

1. Where A., in payment of a debt due to him from B., agrees to accept an order on C. for a debt due from C. to B., B. is not released from liability until he makes such a transfer of the debt on C., as to enable A. to claim it in his own name.

Error to Chariton Circuit Court.

This was an action commenced before a justice of the peace and appealed to the Circuit Court, to recover forty dollars, being part of the price of a horse sold to the defendant. It appeared in evidence, that defendant agreed to pay forty-eight dollars for the horse, of which eight dollars was to be paid in goods, and forty dollars in a debt due from one Carey to the defendant. The goods were delivered, but the defendant having no ink or paper to write an order on Carey for the forty dollars, plaintiff agreed to take a verbal order, and if it was accepted by Carey in the presence of a witness, he agreed to take it at his own risk. Carey never accepted the order in the presence of the witness, nor was he ever called upon to do so. A few weeks afterwards, Carey left the county. The defendant offered evidence to show that the horse was worth less than forty-eight dollars, which was excluded. The court instructed that the defendant was not liable unless Carey had been called upon by the plaintiff, and had refused to accept the order or to promise to pay the debt. The plaintiff submitted to a nonsuit, and brings the case here by writ of error.

Davis, for plaintiff in error. The agreement did not extinguish the liability of the defendant until he did something to give plaintiff a right of action against Carey. No privity was established between plaintiff and Carey. *Butler v. Height*, 8 Wend. 535. 3 A. K. Marsh. 680. Chitty on Contracts, 613-14, 750-56.

J. B. Clark, for defendant in error. It devolved upon the plaintiff to show that he had used at least ordinary diligence

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to get Carey's acknowledgment, before he could come against the defendant.

RYLAND, Judge, delivered the opinion of the court.

By the contract, as proved in this case, and set forth in the above statement, the defendant was to give to the plaintiff forty dollars, part of the price at which the horse was purchased, in a debt on one Carey. This required the defendant to do what was necessary to transfer such interest in the debt on Carey as to enable the plaintiff to claim the debt. The defendant not having done so, he is liable to the plaintiff, and must pay.

In the opinion of this court, it is competent for the defendant to show that the horse was of less value than the price agreed upon originally: the price might have been increased, on account of the risk to be run in the collection of the Carey debt. The judgment of the court below is therefore reversed, and this cause is remanded for further proceedings, in accordance with the views of the court in this opinion; the other judges concurring.

HARNES, Respondent, vs. GREEN'S ADMINISTRATOR, Appellant.

1. A judgment of a sister state, which appears to have been rendered by the court upon a confession before the clerk in vacation, is conclusive.

Appeal from Daviess Circuit Court.

Willard P. Hall, for appellant, insisted that, as it appeared from the record that judgment was rendered in vacation, and as it was not shown what the laws of Virginia were on the subject, they would be presumed to correspond with our own.

Gardenhire, for respondent, contended that the record was

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conclusive. Our courts presume that the proceedings of the courts of sister states are in accordance with their local statutes. 9 Wend. 331. 9 J. R. 385.

GAMBLE, Judge, delivered the opinion of the court.

The plaintiff, Harness, exhibited a demand in the probate court of Daviess county, against the estate of Green, deceased, which was allowed and classed, and the administrator appealed to the Circuit Court. On the trial in the Circuit Court, the transcript of a record from the Circuit Superior Court of Hardy county, Virginia, showing a judgment against the intestate, Green, was presented by the plaintiff, and it was objected to by the defendant; it was admitted by the court, and the demand of the plaintiff was allowed against the estate.

1. The only question which has been presented for our consideration is, whether the transcript shows a judgment by the Virginia court. It is alleged that, upon the transcript, the judgment appears to have been rendered in the vacation of the court, and not by the court in term. This is to be determined by inspection. The transcript shows a writ returnable to rules in the clerk's office; the arrest of the defendant upon the writ; the appearance of the defendant at the clerk's office, and a confession of judgment by him there; and then follows the entry of a judgment, which appears to be the judgment of the court. Its language is, "therefore it was considered by the court that the plaintiff recover," &c. The whole is certified as a transcript of the record and proceedings in the cause lately depending in the circuit superior court of law and chancery of Hardy county, between, &c.

In looking at the transcript, we are satisfied that the judgment is to be taken to be the judgment of the court rendered upon a confession made in the clerk's office. What the provisions of the Virginia laws may be, in relation to the practice in such cases, we cannot know, as they are not before us, and

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therefore we look only at the transcript itself. The judgment of the Circuit Court is affirmed, with the concurrence of the other judges.

FREELAND, Respondent, vs. ELDRIDGE, Appellant.

1. Where the trial is by the court, and no motion for a review is made, as required by the code, the supreme court will only look to see whether the facts found support the judgment.
2. A conveyance obtained without sufficient consideration from a man of weakened intellect by a person having influence with him, practising upon his passions, will be set aside.

Appeal from Weston Court of Common Pleas.

A. Leonard, for appellant. 1. The relief sought is exclusively a matter of equity jurisdiction, and the appeal therefore subjects the whole case, fact and law, to the review of this court. 2. The evidence does not repel the presumption of the fairness of the conveyance, or establish the alleged fraud.

Gardenhire, for respondent. 1. The facts found by the court below warranted the decree. 1 Story's Eq. §238. *Bridgman v. Green*, 2 Vesey, sr. 626. *Clarkson v. Henway*, 2 P. Will. Rep. 203. *Griffith v. Robins*, 2 Madd. Rep. 105. *Underwood v. Brockman*, 4 Dana, 319. 2. No motion for a review having been made, if the facts found warrant the conclusions of law pronounced upon them, the judgment will not be disturbed. *Skinner v. Ellington*, 15 Mo. Rep. 488.

GAMBLE, Judge, delivered the opinion of the court.

1. In this case the trial was by the court, and the judgment was rendered for the plaintiff. The decision of the court, finding the facts and pronouncing the law, was made, but no application for a review was made in conformity to the code of

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practice. This court can in such case look only to the decision of the court below, to see whether the facts found warrant the judgment which has been rendered.

2. The petition seeks to set aside a conveyance made by plaintiff to defendant, on the ground that it was obtained from the plaintiff without any consideration, and by practising upon his fears, at a time when he was in a condition of mental imbecility, and incapable of managing his affairs; that the practices were such as to fill his weakened mind with apprehensions which were artfully encouraged by defendant, and by the wife of plaintiff, who was the daughter of defendant, and under the influence of those fears, and by the persuasions of the defendant and the wife of plaintiff, the conveyance was made.

The court finds that the conveyance of the land by plaintiff to defendant was without consideration; that a note for \$1800, which was given by the defendant to his daughter, the plaintiff's wife, for the consideration of the land, was intended merely to cover the transaction, and was returned by the daughter to her father, the defendant, without his paying any money thereon; that, at the time of the conveyance, the defendant was in a weak and imbecile state of mind, though not insane; that his mind was greatly impaired; that this weakness of mind was, to a considerable extent, produced by the conduct of defendant and plaintiff's wife; that he was falsely induced by them to believe that he was in great danger, and could only be protected by conveying his property to defendant, who was his best friend, and leaving the country; that, under the influence of this fear, produced by the fraud and circumvention of defendant operating on the weakened intellect of plaintiff, he was induced to make the conveyance of his property; that there was a combination between defendant and plaintiff's wife, to procure a separation between plaintiff and his wife, and to procure his property; and to effect this object, the means and appliances before stated were used. The court, therefore, found for the plaintiff. A judgment was rendered setting aside the conveyance.

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There can be no doubt that the facts here found warrant the judgment of the court setting aside the conveyance. It is the familiar law of a court of chancery, that a conveyance obtained without sufficient consideration, from a man of greatly weakened intellect, by a person having influence with him, practising upon his passions, will be set aside. The judgment is, with the concurrence of the other judges, affirmed.

KRITZER, Plaintiff in Error, *vs.* WOODSON *et al.*, Defendants in Error.

1. Under section 20 of article 1 of the act concerning corporations, (R. C. 1845,) the directors of an incorporated company are not liable to a *stockholder* for the excess of the indebtedness of the company contracted during their administration, over the amount of the capital stock paid in.
2. They are not liable to any person, unless the indebtedness existing *at one time* exceeds the stock paid in.

Error to Jackson Circuit Court.

Smart and Sheley, for plaintiff in error. 1. Debts having been contracted by the company exceeding the capital stock actually paid in, and while the defendants were directors, they became liable in their individual capacity to pay the same. R. C. 1845, tit. corporations, art. 1, sec. 1. 2. The plaintiff is entitled to recover from the defendants the amount he was compelled to pay out of his individual means to satisfy the debts so created by them.

A. Leonard, for defendant in error. 1. The liability of the directors who violate the law, is to the corporate creditors and not to the stockholders. 2. The petition is defective, in not showing an indebtedness beyond the lawful limit, existing *at one time*, and contracted during the administration of the defendants.

Kritzer v. Woodson.

GAMBLE, Judge, delivered the opinion of the court.

Kritzer was a stockholder in an incorporated company, called "The Independence and Missouri River Railroad Company." Woodson and others, the defendants, were directors of the company. The petition alleges that the defendants, as directors of the company, incurred debts on the part of the company, to an amount exceeding the amount of the capital stock paid in; the excess being three thousand dollars. It is next alleged, that a creditor of the company recovered judgment against it, and having, upon execution, sold all the corporate property, without satisfying his execution, he issued an alias execution, upon which the plaintiff, Kritzer, as a stockholder, was compelled to pay the sum of seventy-two dollars, as his proportion of the unsatisfied balance of the execution. This action is brought by the stockholder, to recover from the directors the amount so paid by him. The defendants demurred to the petition, and the demurrer was sustained.

Two questions are presented for consideration: 1st. Whether the directors of an incorporated company are liable to the stockholders for the excess of the indebtedness of the company, contracted during their administration, over the amount of the capital stock paid in? 2d. Whether the directors are ever liable to any person, unless it is expressly charged that the indebtedness existing at one time exceeded the stock paid in?

1. The general assembly, with the design of securing those who might deal with corporations, provided by a general law concerning corporations, that, in all corporations, unless otherwise specified in their charter, in case of deficiency of corporate property liable to execution, the individual property of every member of the corporation, having shares therein, should be liable to be taken in execution, to double the amount of his stock, and no more, for all debts of the corporation contracted during his ownership of such stock. R. C. 233, sec. 13. The act then proceeds to give to the creditor very stringent reme-

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dies against the stockholders. The 19th section provides that, if the directors of a corporation shall declare and pay any dividend, when the corporation is insolvent, or the payment of which would render it insolvent, they shall be jointly and severally liable for all the debts of the corporation then existing, and for all debts that shall thereafter be contracted, as long as they shall continue in office: provided, that the amount for which they shall all be so liable, shall not exceed the amount of such dividend. It appears very clear, that the responsibility of the directors, under this section, can only be to the creditors of the corporation; for the improper payment of the dividends, which occasions the responsibility, is a payment made to the stockholders, and it cannot be intended to give them any right of action against the directors, to recover, on account of their having received dividends; so also, the liability incurred by the directors, is a liability *for the debts of the corporation*; and as the creditors are the persons to enforce those debts, they alone could claim against the directors. The 20th section is that upon which the present plaintiff claims that the directors are liable to him. It provides, that the whole amount of debts of any corporation, except banking companies, shall not exceed the amount of its capital stock actually paid in; and in case of any excess, the directors under whose administration it shall happen, shall be jointly and severally liable to the extent of such excess, for all the debts of the company then existing, and for all that shall be contracted, so long as they shall respectively continue in office, and until the debts shall be reduced to the said amount of the capital stock.

The directors of an incorporated company are chosen by the stockholders, and manage its concerns for the benefit of the company. Any debt that they contract in the name of the company, if contracted in good faith, is for some property or advantage secured to the company, and the company is supposed to receive a benefit equal to the amount of the debt. If they are guilty of misconduct by which the corporation suffers loss, or if they wilfully misapply or waste the corporate funds,

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they may be held liable to the corporation for such misconduct. *Franklin Ins. Co. v. Jenkins*, 3. Wend. 130. *Robinson v. Smith*, 3 Paige, 233. The acts for which they are thus held liable, are acts injurious to the corporation, diminishing its resources. Contracting debts beyond the amount of the capital stock paid in may not injure the corporation, if they are in good faith contracted for property, or other consideration received by the company. But such excess of indebtedness may endanger the interests of creditors of the corporation, whether contracted in good faith or not; and the 20th section of the act was designed to guard their interests. It is plain that the section does not make the directors the primary debtors for the excess, for the creditors still continue to have their rights against the corporation, while they have the additional guaranty of the liability of the directors. The words of the act which make them liable for the debts of the company make them liable to those who are the creditors, holding such debts against the company. The debts are still the debts of the company.

The provisions of the section are penal, and are not to be extended beyond the necessary meaning of the language. The object to be attained is, the caution in contracting debts for a corporation which shall always keep the creditors secure. The section which renders the stockholders individually liable for the debts of the corporation, to double the amount of their stock, and that which renders the directors liable to the amount of any excess of debts, beyond the capital stock paid in, without regard to the amount of stock held by the directors, are both framed with the same design; that is, to protect creditors. While the directors may, under other law, be liable to the company for wilful waste and management of the corporate funds, this section was not intended to regulate their liability to the company, or to the individual stockholders, and neither the company nor the stockholders can recover against them under this section.

2. The next ground of the demurrer is equally fatal to the

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action. The petition alleges that, while the defendants were directors, "the board incurred debts in building and making the railroad and depots, to an amount exceeding the capital stock paid in, by the sum of three thousand dollars;" and, further, that the debt due to the creditor, to which the plaintiff, as stockholder, was compelled to contribute, "was, or the most of it was, over and above the capital stock of the company actually paid in."

The directors who sued in this action may have been such for years, and may, from time to time, have contracted debts for the company, which, in their aggregate amount, exceeded the capital stock, when there was, at no time, an existing indebtedness greater than the amount of stock; in such case, it is not supposed to be the meaning of the act that the directors should be liable for the debts. The petition is so framed as to assert the liability of the directors on this ground. It does not charge that, at any given time, there was an indebtedness, exceeding the amount of the capital stock paid in.

The demurrer, then, was properly sustained, and the judgment is, with the concurrence of the other judges, affirmed.

DONOHOE, Respondent, *vs.* VEAL, Appellant.

1. Under the revenue act of 1845 and the amendatory act of 1847, no title to land sold for taxes passes until a deed is executed by the register. The deed does not relate back to the sale.
2. The 4th section of the amendatory revenue act of March 12, 1849, only applies where the sale was made after its passage.

Appeal from Chariton Circuit Court.

Turner, for appellant, among others, made the following points: 1. The act making the register's deed *prima facie* evidence of title is unconstitutional. If the legislature can make it *prima facie*, it can also make it *conclusive* evidence

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of title, and thus give the register absolute control over private property within the state. 2. If, however, the act is constitutional, a deed, to be *prima facie* evidence, must show, by recitals, that all the pre-requisites of the law have been complied with, which the deed, in this case, does not. 3. But if the deed be sufficient evidence of title in Thomas Donohoe, yet it is only evidence of title from its date, and does not relate back to the sale. *Alexander v. Merry*, 9 Mo. Rep. 514. *Hart v. Rector*, 13 ib. 497. The quit claim deed from Thomas Donohoe to the plaintiff did not pass the title subsequently acquired by the register's deed. *Bogy v. Shoab*, 13 Mo. Rep. 365. The plaintiff could at most only recover for trespasses committed after the date of the register's deed.

A. Leonard, for respondent. 1. The amendatory revenue act of February 13, 1847, making the register's deed *prima facie* evidence of title is, beyond all question, constitutional. 20 Ohio Rep. 561. *Vance v. Schuyler*, 1 Gill. (Ill.) Rep. 162. 1 Watts, 344. A sale for taxes and a lapse of two years, without redemption, are the jurisdictional facts that authorize the register to make a deed, and the deed itself is *prima facie* evidence of these facts. It is enough that there has been a sale *de facto*, and not necessary, in order to make out a *prima facie* title, that it should appear to have been rightfully conducted. 2. The deed related back to the sale, and vested the title in the purchaser from that time. This is so on common law principles; but in this case, there is a statute which so provides in effect. Amend. Rev. Act of 1849, §4.

GAMBLE, Judge, delivered the opinion of the court.

Donohoe filed his petition against Veal, to recover treble damages for alleged trespass on a tract of land claimed by Donohoe. The action was under the statute allowing the recovery of treble damages for certain descriptions of trespass.

On the trial, the plaintiff, in order to show his title to the land, gave in evidence a deed from the register of lands of the

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state to Thomas Donohoe, dated February 10, 1851, in which it was recited that the state and county taxes on seven tracts of land described in the deed, amounting to eight dollars and thirty-six cents, including interest and incidental costs, remained due to the state and county; and that the register had, on the first Monday in June, 1848, advertised the land for sale to pay the taxes and penalties remaining due—the sale to take place on the first Monday in October, 1848; and the collector of the county on that day, before the court-house door of the county, exposed the land for sale, and did sell the same to Thomas Donohoe, for the taxes, interest and costs due thereon, he being the highest bidder for the same, for the sum of eight dollars and thirty-six cents; therefore the register conveyed the land in fee to said Thomas Donohoe. The plaintiff next gave in evidence a deed from Thomas Donohoe, for the land, conveying it by quit claim to the plaintiff, which was dated April 18, 1849. Objection was made to these deeds being admitted in evidence, but the objection was overruled, and they were read to the jury.

The evidence given by the plaintiff in relation to the trespass by the defendant, showed that trees were cut by him on the land after the date of the sale for taxes by the collector, and after the date of the deed from Thomas Donohoe to Stephen Donohoe, the present plaintiff, and before the execution of the deed by the register to Thomas Donohoe.

The Circuit Court, at the instance of the plaintiff, instructed the jury that, “if they found from the evidence, that the deeds read in evidence were executed and recorded as they profess, then they will find that the plaintiff was entitled to the land in the petition mentioned, from the 18th day of April, 1849; and if they find that defendant, at any time after that day, and before this suit was brought, cut down or carried away any timber or rails, on or from said land, they will find for plaintiff.”

1. The date mentioned in this instruction is that of the deed from Thomas Donohoe to the plaintiff, and the principle assert-

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ed is, that the plaintiff is entitled to maintain the action for trespasses committed by the defendant at any time after the conveyance made by Thomas Donohoe, although before the conveyance by the register. This position is attempted to be sustained in argument, on the ground that the register's deed made in February, 1851, has relation back to the sale made by the collector, in October, 1848, so as to vest the title to the land in Thomas Donohoe from the date of that sale, and transmit the title to the plaintiff from the date of the conveyance made to him from Thomas Donohoe. The doctrine of relation has been applied in this court, in cases of sheriff's deeds, made after the lapse of considerable time from the actual sale. *Crowley v. Wallace*, 12 Mo. Rep. 146. *Alexander et al. v. Merry*, 9 Mo. Rep. 524. The principle stated in those cases, and which is extracted from the old books is, "that, where there are divers acts concurrent, to make a conveyance, estate or thing, the original act shall be preferred, and to this the other acts shall have relation." The same rule has been applied to leases or deeds made in pursuance of an agreement, so as to make them relate to the date of the agreement. *Johnson v. Stagg*, 2 John. 510. So, an acknowledgment has been held to relate back to the execution of the conveyance. *Doe v. Dugan*, 8 Ham. 87. A confirmation by the first board of commissioners has been held to relate back to the time at which the claim was filed. *Landes et al. v. Brant*, 10 Howard, 372. The rule has been applied in a great variety of cases for the furtherance of justice, and it is not necessary to mention the different classes of cases in which it has been adopted.

It is attempted to apply the rule to a case in which a sale for taxes was made by the collector in October, 1848, and the deed of the register in February, 1851. What was the effect of the sale made by the collector, and what rights were acquired under it? The ninth section of the revenue act of 1845, (R. C. 950,) required the collector, when a sale was made of any land for taxes, to grant to the party purchasing a certificate therefor. The sections immediately following provided for

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the redemption of the land so sold, at any time within two years ; and the seventeenth section directs that, upon a failure to redeem, the register should execute a deed for the land. The act of February 13, 1847, amends the act of 1845, in relation to the proceedings which precede the sale, and in the 29th section it directs, that the register shall execute deeds for lands which have been sold, and which have not been redeemed within two years after the sale. There is a difference between the clauses in the acts of 1845 and 1847, which relate to deeds executed by the register, in the effect such deeds are to have as evidence of title. In the act of 1845, (article 5, sec. 18, R. C. 952,) it is declared that such deed "*shall be considered prima facie evidence of title in the purchaser, upon his showing that the foregoing provisions of this article, which authorize the execution of such deed, have been complied with.*" The provision in the act of 1847 is: "*such deed shall be prima facie evidence of title in fee simple in the purchaser for the taxes, to the land or town lots set forth in the same, and the burthen of proving that the title is not in the person claiming to hold under the deed from the register, shall lie upon those claiming adversely to such deed.*" Section 30.

The two acts, while they differ, in putting the onus upon different parties, do not differ in the necessity of a compliance with all the requirements of law which are to be observed before the execution of the deed. The principle still remains untouched, that a person claiming to hold land under a sale for taxes, can only maintain his title when the law has been strictly pursued.

It is to be observed that, in neither of these acts is there any intimation that the deed is to afford any evidence of title in the purchaser, prior to its date. In the absence of any such provision, the deed can have no such effect, unless the previous proceedings contemplated the passing of the title to the purchaser before the time appointed for making the deed. If the law did not propose to give the purchaser the title to the land,

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until two years should elapse from the time of the purchase, then it did mean that the title should remain in the owner for that period, and the right of the purchaser was, to receive his money, with a high penal interest, during the delay of redemption. It appears very clearly to be the design of these two acts, that the title to property sold for taxes shall remain undisturbed, until the deed is actually executed by the register; and that, until that act is performed, the title is in the former owner.

Such being the design of the acts, the doctrine of relation cannot be applied to such deed, to give it an effect and operation, contrary to the meaning of the law, by allowing the person claiming under it, to maintain, not only actions of trespass for injuries done after the sale, and before the conveyance by the register, but actions for the rents, issues and profits accruing during that period. The whole scheme of these acts very plainly shows that such a construction, or applying the fiction of relation to such a case, would be contrary to the intention of the legislature.

2. But it is said that the act of March 12, 1849, (Sess. Acts, 111,) recognizes the right of the purchaser of land sold for taxes, to take possession of the land immediately after the sale. The fourth section of the act provides that "the certificate of purchase, required to be given by the collector to the purchaser of land sold for taxes, according to the ninth section of the fifth article of the act of 1845, shall be *prima facie* evidence of title to the premises thus sold, until the time for the redemption of such lands shall have expired, and shall warrant the purchaser in taking possession of, and using the premises; but such purchaser shall not cut or carry away any timber on the land so purchased, until the expiration of the time for redemption." This provision is itself novel in our revenue laws, and can have no effect, where the sale was made before its passage. If the legal effect of the sale, when made under the previous law, was not such as to pass the title to the purchaser, this act could not change the nature of the transac-

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tion, and give him the title. If the purchase made by Thomas Donohoe, at the collector's sale, in October, 1848, did not, according to the laws then in force, give him a title to the land, or a right to the possession, the act of 1849 could not confer upon him such title under his purchase. Nor is the act of 1849 to be understood as a legislative exposition of the former acts; for the title which is evidenced by the certificate, is a title to the premises, warranting the possession and use of them, but such a title as is inconsistent with the right to cut and carry away the timber, which is, undoubtedly, a description of title that has its original conception in the act of 1849, and not in any previous acts.

The instruction of the court, which gave effect to the register's deed, as supporting the right of the plaintiff to recover for trespasses committed prior to its execution, was erroneous, and, as this appears to be a question that covers the case between the parties, it may not be necessary to touch upon other points presented in the argument.

The judgment of the Circuit Court is, with the concurrence of the other judges, reversed, and the cause remanded.

Ex Parte CRAIG.

1. A circuit attorney is only entitled to one fee for a conviction upon one indictment, although it may contain more than one count.

Application for a mandamus on the auditor of public accounts.

W. P. Hall, for Craig.

Buffington and Gardenhire, contra.

Craig, as circuit attorney for the 12th judicial circuit applies for a mandamus to the auditor of public accounts, requiring him to audit and allow an account for fees for the conviction of William Powe in the Buchanan Circuit Court, upon an

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indictment for grand larceny. The counsel for the circuit attorney and the attorney general file an agreed case, in order that the decision of this court may be made on the application, with the same effect as upon a return to an alternative mandamus. It appears that the prisoner was convicted of the offence of grand larceny, upon an indictment containing two counts, the conviction being upon both counts. The clerk, in taxing the costs, taxed for the circuit attorney a fee of eight dollars for each count in the indictment, being together, sixteen dollars. The fee bill was certified to the auditor, as the prisoner was unable to pay costs, and the auditor struck out eight dollars of this charge, and refused to allow but eight dollars for the entire conviction.

1. The statute gives the circuit attorney fees in this language: "For a conviction in any case, where the punishment assessed shall be confinement in the penitentiary, except cases of rape, arson, burglary, robbery, forgery and counterfeiting, eight dollars." R. C. 490.

The fee allowed is *for a conviction in any case*. This means the whole case between the state and the defendant, in which there is a conviction. Where there are several counts in an indictment, a conviction may be upon one or more, or upon all of the counts, but it is only one conviction, one verdict, and one judgment. The circuit attorney, in such case, is entitled to one fee of eight dollars, and no more. Here there was a conviction of a prisoner on two counts, but it was only one conviction. The auditor properly refused to allow more than one fee of eight dollars. The mandamus is refused, with the concurrence of the other judges.

Ex Parte Skaggs.

Ex Parte SKAGGS.

1. No appeal lies from the refusal of an application for a mandamus.

Appeal from Clay Circuit Court.

Application for a mandamus to the clerk of the county court requiring him to issue to the petitioner a certificate of his election as sheriff of Clay county. The petition stated that an election of sheriff was held in August, 1852, at which the petitioner, and Samuel Hadley, who was constitutionally ineligible, were the only candidates; that the number of votes polled was 1217, of which 778 were illegally cast for said Hadley, and 439 were legally cast for the petitioner. The Circuit Court refused to issue a mandamus, and gave judgment for costs, and the petitioner appeared before the clerk in vacation and appealed to this court.

Hayden, for appellant, insisted that this court has appellate jurisdiction. The judgment was a final one, not only denying the plaintiff the enjoyment of the office of sheriff, with its emoluments, but taxing him with the costs of his application.

GAMBLE, Judge, delivered the opinion of the court.

Skaggs applied to the Circuit Court of Clay county, for a mandamus to the clerk of the county court, requiring him to issue to Skaggs a certificate of his election as sheriff of that county. The Circuit Court refused to issue the mandamus, and Skaggs appeared before the clerk of the Circuit Court, and prayed an appeal to this court.

1. When a mandamus issues and is returned, the person obtaining the writ may require the judgment of the court upon the sufficiency of the return, or he may, under our statute, traverse the return, and thus produce an issue of fact. When the Circuit Court pronounces its judgment upon the questions of law and fact arising upon the return, and awards or refuses

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a peremptory mandamus, there is a judgment between parties which may be reviewed here, either upon an appeal or writ of error. But neither an appeal nor writ of error lies to the refusal of a circuit court to issue a mandamus upon the application of a petitioner. This was settled in *Shrever et al. v. Livingston County*, 9 Mo. Rep. 196.

The appeal of Skaggs will be dismissed, with the concurrence of the other judges.

WOODSON, Appellant, vs. POOL *et al.*, Respondents.

1. Indebtedness at the time of a post-nuptial settlement is evidence of fraud, although there is a diversity of opinion as to the extent of indebtedness necessary to invalidate such a settlement.
2. A conveyance for the benefit of a wife, in consideration of dower previously relinquished by her, is voluntary as to existing creditors.
3. A parol gift of a slave by a husband to his wife does not change the title.

Error to Jackson Circuit Court.

This was a bill in equity in the Jackson Circuit Court by Woodson, an execution purchaser, to declare a settlement of a tract of land in Jackson county, made by James Pool upon his wife and children, void for fraud upon his creditors.

The suit was against the settler, James Pool, James Brown, the trustee, Hall, from whom Pool acquired the land, and Pool's children, the beneficiaries in the trust, the mother having died since the creation of the trust, and Dresser, a tenant of Pool's, in possession of the land.

The facts of the case are about these: At the September term, 1846, of the Jackson Circuit Court, four judgments were rendered against Pool, in favor of different persons, for a total of about \$2000. These judgments were founded on notes payable immediately, the earliest of which was dated as far back as August, 1842. The others were dated in August,

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1845, and February and June, 1846. The land in controversy was sold in March, 1848, under execution upon these judgments, and Woodson, the plaintiff, became the purchaser for \$130, and took a sheriff's deed in September, 1848.

Hall was the original owner of the land, and sold it in January, 1845, to James Pool for \$300, the ground being then unimproved. At the time of the purchase, Pool and his wife said they wanted to buy it for her and her children, and offered to pay for it with a negro woman, that they said Pool had some years before given to his wife, for a relinquishment of her dower in a lot in Independence that Pool had sold to Fristoe. Hall declined taking the negro, but told them if they would sell the woman, and take a note from the purchaser, he would take it for the land. Shortly afterwards, Pool sold the woman for \$400, received \$100 in cash, and the purchaser's note for \$300, payable to himself, which he assigned to Hall to pay for the land, and Hall executed his bond in January, 1845, to James Brown, (Mrs. Pool's brother,) for the title, to be held by him in trust for Mrs. Pool, and after her death, for the use of her children by the present marriage. Afterwards, in July, 1845, upon the payment of the note, the deed was accordingly made to Brown upon these expressed trusts.

Pool resided at Independence several years before 1843, and owned a house and lot there, which he sold to Fristoe, and removed to Arkansas. He returned to Independence in 1843, where he has since resided. In January, 1845, the only property he owned was the negro woman sold to pay for the land in controversy, her child, two or three years old, his tools and shop materials, and a house and lot in Independence that he had previously bought of Parker, and sold to Stone in August, 1845. Pool's business was wagon making and blacksmithing, which he carried on quite extensively in shops on his lot. He sold his lot, shop and tools to Stone August 15th, 1845, for \$2200, \$500 of which he received, and the balance was paid to Parker in payment of what he owed Parker. After selling this property, Pool commenced improving the land in contro-

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versy, built a dwelling house and shop on it, for which he expended \$1500, and resided and carried on his business there; and when bought by the plaintiff under execution the property was worth \$1500. Pool was always in debt, hard pressed for money, reckless about contracting debts, and never able to pay his debts if they had been pressed against him. He was deeply in debt in January, 1845, unable then to pay his liabilities, and at last utterly failed, leaving a large mass of debts yet unpaid.

Pool put in no answer to the bill. The mother died before the commencement of the suit, and the children put in formal answers, merely stating that they had no knowledge of the transactions, and calling for strict proof. Upon the trial, no proof was given on the part of the defendants. The court dismissed the plaintiff's bill, and he sued out a writ of error.

Leonard, for plaintiff in error. The settlement is voluntary, and the plaintiff stands in the place of a prior creditor, and therefore it is void as to him, as a shere matter of law. *Reade v. Livingston*, 3 J. C. R. 491-500. This rule has been adhered to, in all its rigor, in several states; (*Miller v. Thompson*, 3 Porter, 196. *O'Daniel v. Crawford*, 4 Dev. 197. *Bogard v. Saidly*, 4 S. & M. 302. *Izzard v. Izzard*, 1 Bailey's Eq. Rep. 228-36;) and although it has been relaxed in others, this cause cannot be brought within any exception that has yet been recognized. *Hutchison v. Kelly*, 1 Robinson's (Virg.) Rep. 128-142. *Sexton v. Wheaton*, 8 Wheat. 229. *Vanwick v. Seward*, 18 Wend. Rep. 398-402. *Beckhouse v. Jett*, 1 Brock. Rep. 510-11. *Hopkirk v. Randolph*, 2 Brock. Rep. 137. *Chamberlayne v. Semple*, 2 Rand. (Va.) Rep. 399. *How v. Ward*, 4 Greenl. Rep. 198. The plaintiff stands in the place of the creditors under whose judgments he purchased, clothed with all their rights; so that, if the settlement be void as to any one of them, it is, as a shere matter of law, void as to him. One of the judgments was founded upon a note given as early as August, 1842, and the fair presumption is, that all of them were founded upon debts

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contracted prior to the settlement. The pretended consideration for the settlement is a part of the proceeds of a negro woman, bought by the wife from her husband, for the alleged relinquishment of her dower in certain real estate sold many years before. There is no evidence of any such purchase, other than the declarations of the parties themselves, made too, at the very moment they were putting into execution the fraud imputed to them. If such a purchase were in fact made, it was clearly fraudulent, and did not pass the property against the husband's creditors, prior or subsequent. There was no change of possession, the husband used the property as before, and obtained credit on his apparent ownership, and finally sold it as his own. Another view of this case is this: the settlement was made to secure the land bought, and the improvements afterwards put upon it with the husband's means, for the benefit of the husband and wife during their lives, and afterwards for the use of their children. The effect of this settlement was, to place the husband's means beyond the reach of his creditors, and yet he had the enjoyment of them. The law imputes bad faith when the direct effect of a transaction is to defraud. To save this transaction then from the just imputation of fraud, those who claim under it must show affirmatively a valuable consideration and good faith. A *fair* consideration must have been paid. A wife's contingent right of dower in an ordinary dwelling house in a country village, even if worth \$300, will not relieve from the imputation of fraud a settlement upon the wife and children, of an insolvent husband's property, to the extent of \$1500.

Napton, for defendants in error. 1. The land in controversy was purchased with the proceeds of a negro girl given by Pool to his wife in consideration of a relinquishment of her dower in certain real estate. This negro girl, or the money substituted for her, however either may have been subject to the husband's debts, was yet, in equity and morals, the property of the wife, and having assumed a shape exempting it from legal process, where it ought to have been, a court of equity will

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never disturb it and put it back in a position to be reached. 8 Watts & Serg. 413. The *Bank v. Brown*, Riley's Ch. Rep. 131-5. 1 Am. Lead. Cases, 65. 2. But even if this settlement were voluntary, the testimony shows that when it was made, there was but one debt, and this bore a very small proportion to the mass of Pool's property, and that Pool was entirely solvent. 3. There is no evidence in this case of any thing like fraud in fact, unless it is fraudulent for a mechanic, extensively engaged in a hazardous enterprise, to place out of the reach of his creditors a small lot of ground containing a shelter for his family. 4 Mason, 444. 4 Metcalf, 486.

SCOTT, Judge, delivered the opinion of the court.

1. The second section of the act concerning fraudulent conveyances, embodies the principle which must be decisive of this controversy. In the construction of this section, it has always been held, that indebtedness, at the time of a voluntary conveyance was evidence of fraud. Some diversity of opinion has existed as to the extent of the indebtedness, in some cases, as almost every man must be indebted for some small amounts. But this case leaves no doubt that the indebtedness was to such an extent as must have affected the *bona fides* of the transaction. One of the debts for which the land was sold existed long anterior to the conveyance, and the evidence clearly shows the long continued previous embarrassment of the grantor, which ultimately resulted in notorious insolvency.

2. The only pretence by which the conveyance can be upheld is, that it was for a valuable consideration. There can be no question but that a wife's relinquishment of her dower is a sufficient consideration to support a suitable conveyance to her for such relinquishment. But to make an assignment of the right to dower available as a consideration, it must be effected in compliance with the forms of the law. If the right to dower has already been assigned, a conveyance, in consideration of such an act previously done, would be voluntary as to existing creditors, although binding between the parties.

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3. There is no evidence in the record that the slave was given to Mrs. Pool, in consideration of a relinquishment of dower. If a husband says to his wife, I give you a slave, what is effected in law by such a form of conveyance? Are not the parties and the thing conveyed, after such a pretended gift or conveyance, in the same situation as they were before it was attempted? There is none but hearsay evidence, and that from an interested source, that there was any conveyance of the slave to Mrs. Pool, and even that stands contradicted by the subsequent conduct of Pool (the husband) towards a child of the slave alleged to be conveyed. The instrument evidencing the conveyance of the lot to Mrs. Pool, unsupported by any testimony, would scarcely be regarded as sufficient to defeat the claims of creditors. In no view of the case can the decree of the court below be sustained.

The other judges concurring, the decree will be reversed, and the cause remanded.

McCARTY & WIFE, Plaintiffs in Error, *vs.* ROUNTREE, Defendant in Error.

1. Under our statute, the parent, as natural guardian, has no power to dispose of the property of the minor child not derived from such parent, before giving bond with security.
2. No demand before suit is necessary where the defendant is wrongfully in possession.

Error to Polk Circuit Court.

This was a suit commenced by Benjamin F. McCarty and Mary Ann, his wife, for the possession of a slave named Mary and her increase. The petition stated that Robert Noll, in the state of Tennessee, in 1836, gave the slave Mary to the plaintiff, Mary Ann, his grand-daughter, who was then an infant, residing in the family of her father, Abner F. Noll; that shortly afterwards said Abner F. removed with his family to Polk

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county, Missouri, bringing the said slave with him ; that in 1838, said Abner F., without the consent of said Mary Ann, sold and delivered said slave to Campbell & Bunch, who sold and delivered her to the defendant. No demand before suit was alleged or proved. On the trial, there was evidence to sustain the allegations of the petition. The defendant offered some evidence, for the purpose of showing that Robert Noll really intended the gift for the benefit of his son, and made use of the name of the plaintiff, Mary Ann, to keep the slave beyond the reach of the creditors of Abner F. Noll.

The court directed the jury that the sale of the slave by the father, while in his custody as natural guardian, passed the title of the ward, if there was no fraud on the part of the purchaser ; and refused to instruct that the father had no control over the slave as natural guardian, unless he had given bond with security, as required by statute.

Leonard and Hayden, for appellant. 1. A guardian by nature has no authority at common law over the estate of his ward, and even by our statute, he has no such authority, until he has given the security required by the statute, except perhaps over property that he himself may have given to his child. R. C. 1835, tit. "Guardian and Ward," secs. 1 and 7. R. C. 1845, same title, secs. 1 and 17. *Hyde v. Stone*, 7 Wend. 354. *May v. Calder*, 2 Mass. 55. *Mills v. Boyden*, 3 Pick. 216 and 217. *Genet v. Talmadge*, 1 Johns. Ch. Rep. 4. Children are the favorites of courts of justice, and being incapable of protecting themselves, are under the peculiar protection of the courts of the country. If it were required, the courts would be warranted by the necessity of the case, in straining the words of the statute, so as to deny to the father any power over his child's property not derived from him, until he had given the security required by law. Here, however, there is no such necessity. The statute requires all other guardians to give security *before* they enter upon their duties, and then expressly requires guardians by nature to give security *as other guardians* ; that is, before they enter upon

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the duties of their office ; and it has always been held, even when not so expressly provided, that the provision is not merely directory, but a condition that must be fulfilled, in order to clothe the guardian with the power to act. 2. A guardian's authority over his ward's personal property, is a mere authority, without an interest—the title remaining in the ward, and the guardian being merely entrusted with authority to manage it for the ward's benefit ; and so, a sale made by a father, in his own right, and not as guardian, transferring his *own* title, and not the title of his ward, cannot divest his ward's title. *Granby v. Amherst*, 7 Mass. 1. *Mason v. Fletcher*, 13 Pick. 206.

Wright and Gardenhire, for respondent. The father, as natural guardian, possesses as ample power to control the estate of his minor children as any other guardian. Whatever might have been his authority at common law, our statute places him on the same footing as other guardians. The title to the personal property of the ward is vested in the guardian, and he has full power to dispose of it. The question as to the due exercise of the power arises between him and his ward, to whom he is responsible for the faithful discharge of his duties, but a stranger who buys from him in good faith will be protected. *Field v. Schiffelin*, 7 J. C. R. 150. The giving of bond and security is not a condition precedent to the guardian's right to act. The clause requiring bond to be given is merely directory. If he fails to give bond, the court may, upon suggestion, appoint a curator, but until that is done, his right to act and control the property of the ward continues. There was no demand before the commencement of this suit, which was necessary. 13 Ill. Rep. 315. The evidence tends to show that the slave was really intended for Abner F. Noll, and not for his daughter, and that, if her name was used in the transaction, it was to protect the property from his creditors. The instructions took from the jury all consideration of the question of fraud.

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RYLAND, Judge, delivered the opinion of the court.

McCarty and wife brought their civil action in the Circuit Court of Polk county, against Rountree, for the recovery of a negro woman and her two children, slaves. The plaintiffs suffered a nonsuit under the instructions of the Circuit Court—moved to set the same aside, but failing in their motion, they excepted to the opinions of the court, and bring the case here by appeal.

From an examination of facts set forth in the record, the main question in the case involves the power of the father, as *natural guardian*, to manage and control the personal property of his child, which has come to the child from any other person than the father, before he has given bond, as required by our statute.

It is well settled that the guardian by nature has, at common law, power over the person only, and not the personal estate of the ward. The question here depends on the construction of our statute.

The first section of the act concerning guardians, curators and minors, (R. C. 1835, p. 294,) the law in force when the plaintiff's wife was brought to this state by her father, is as follows: "In all cases not otherwise provided for by law, the father, while living, and after his death, and when there shall be no lawful father, then the mother, if living, shall be the natural guardian of their children, and have the custody and care of their persons, education and estates; and when such estate is not derived from the parent, acting as guardian, such parent shall give security, and account as other guardians." Section 7 of the same act: "All guardians and curators appointed by the courts, or chosen by the minors, shall be twenty-one years of age, and shall, respectively, before entering upon the duties of their offices, give bond, with security, to be approved by the court before which they shall be appointed or chosen, to the state of Missouri, for the use of the minors respectively," &c., &c.

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The first and seventeenth sections of the act of 1845, concerning guardians and minors, (R. C. 1845, p. 547-550,) are very similar to the first and seventh sections of the act of 1835.

The plaintiffs contend that, under the provisions of our statutes, though the father or mother is declared to be the natural guardian of his or her child, and as such has the custody and control of his person and his education, and is entitled to have the control and management of his estate; yet, before such natural guardian can have any control or power over the estate of his ward, he must enter into bond and security to the state, as is required to be done by other guardians, unless the power and control be exercised only over such property as may be derived by the ward from such natural guardian; that is, whenever the minor child becomes the owner of property through any other person than its natural guardian, such natural guardian must *first give bond and security*, as the law requires of other guardians, before he has any control or power over the estate of his child and ward.

The respondent, on the other hand, contends that the father, as natural guardian, under our statute law, has the control and power over the estate of his child, no matter from what source derived, and can manage and control such estate of the ward, without first entering into the bond with security, as is required by other guardians—consequently, that he can sell and make way with his child's property, being responsible to such child only.

The plaintiff's counsel very correctly remarks that children are the favorites of courts of justice, and being incapable of protecting themselves, are under the peculiar protection of the courts of the country. The courts, then, should construe the statutes designed to protect the rights and estates of minors, liberally, so as to promote the object of such statutes, as far as can be done consistently with their phraseology.

1. In the opinion of this court, the father, as natural guardian of his child, has no right to control or dispose of the property

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of the child, derived from any other person than the father, until he has given bond with security under the statute.

Look at the last clause of the first section of the act of 1835—guardians, &c., above quoted. The first part of the section gives “the custody and care of the persons, education and estate of the children” to the natural guardian, and the last clause qualifies this power, by declaring “that, when such estate is not derived from the parent acting as guardian, such parent shall give security, and account as other guardians.” Now this very same statute, in section seven, expressly requires that “all guardians and curators appointed by the courts, or chosen by the minors, shall be twenty-one years of age, and shall, respectively, *before entering* upon the duties of their offices, *give bond, with security*, to be approved by the court,” &c.—“shall give security, and account as other guardians.” How and when do other guardians give security? By going before the court having probate jurisdiction, or the court appointing them, and giving their bonds in double the value of the ward’s estate or interest committed to their care, with security to be approved by the court, payable to the state of Missouri, for the use of the minors, before they shall enter on the duties of their office. Then, under this first section, as the natural guardian, the father must give his bond with security, like any other guardian, before he can have any power or control over his child’s estate, other than what he has himself given to his child. He, as the natural guardian, cannot dispose of his child’s property—has no power over it—no authority to sell it, until he gives his bond, as required by the act of the legislature. This is the plain and obvious meaning of the statute. Any other and different construction would place the estates of minors, in the hands of their natural guardians, to be wasted or spent, as circumstances might urge, without any benefit to the minor, or any available responsibility of the natural guardian.

2. This view of the subject settles the point raised by respondent’s counsel, about the making a demand before bringing

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the suit. The natural guardian having no right, before giving bond, to dispose of his daughter's slave, could pass no title to the slave by his individual act of sale to Campbell & Bunch, nor did they pass any title by their sale of the slave to defendant. The plaintiffs might, therefore, well sue, without demand being first made.

The point raised by the respondent about fraud, as to the creditors of the father of plaintiff's wife, that is, the creditors of Abner F. Noll, has no force in it. The grand-father gives to his grand-daughter a negro girl: how can this affect the creditors of the father of the grand-daughter? Have they any cause of complaint that a child of their debtor should receive a donation from a person who owes them nothing?

Upon the whole case, this court is of opinion, that the court below erred in refusing to give proper instructions, and in giving illegal instructions. Its judgment is therefore reversed, and this cause is remanded, to be further proceeded in, after setting aside the nonsuit, in accordance with the views and principles contained in this opinion. The other judges concurring.

BOWERS, Respondent, *vs.* BOWERS, Appellant.

1. A finding of the facts which merely states that the defendant was guilty of acts and abuse which were indignities, without stating the nature of the acts or abuse, is not sufficient to support a decree for a divorce.
2. A petition for a divorce which only charges, in general terms, that one party offered to the other indignities which rendered his or her condition intolerable, is not sufficiently specific under the statute.

Appeal from Weston Court of Common Pleas.

This was a petition for divorce and alimony, filed by Mary A. Bowers against Samuel C. Bowers. The plaintiff obtained a decree, and the defendant appeals. The facts found by the court below are sufficiently stated in the opinion of the court.

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Vories, for appellant. 1. The finding of the court below was not supported by the evidence. 2. The finding does not support the decree. No *fact* was found which entitled plaintiff to a divorce. 3. The court erred in allowing plaintiff a gross sum, out of the defendant's estate, instead of allowing her a share of his income. *Miller v. Miller*, 6 J. C. R. 91. *Burr v. Burr*, 10 Paige's Ch. Rep. 26.

Hayden, for respondent. 1. This court will not look behind the finding of the court below into the evidence, as no motion for a review was filed, until after four days had elapsed. 2. The allegations of the petition and the finding are sufficient to support a decree. 3. The sixth section of the act concerning divorce and alimony, gives the court a discretion as to what order shall be made touching alimony.

GAMBLE, Judge, delivered the opinion of the court.

In this case, the petitioner seeks a divorce from her husband. The cause of the divorce stated in the petition is intended to be brought under the clause of the statute which allows a divorce to be granted, when "either party shall offer such indignities to the other as shall render his or her condition intolerable." The trial was before the court, and there is a finding of the facts upon which a divorce was granted, and the defendant appealed.

1. The finding of the court, in that part of it which relates to the question, whether such indignities were offered by the defendant to the plaintiff as to render her condition intolerable, is in these words: "That, through defendant's relations, his mind was completely poisoned against her; that, after his recovery, and the commencement of the difficulty, as in proof, the acts and abuse in proof, of the defendant and his relations, in reference to plaintiff, were by concert, and intended to drive her off, and get rid of her and her claim to alimony; that their acts and abuse, the motive for which was understood by plaintiff, were such indignities to her and her person as did render her condition intolerable."

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The finding of the court should state the description of acts which constitute the indignities complained of, particularly when third persons are introduced as actors in the domestic difficulties of man and wife. In the petition, we find many facts stated which do not savor of the character of indignities, such as uselessly removing, without consulting the petitioner, from a comfortable house to an open log cabin, and from thence to another inferior house, called in the petition, a kitchen, and such as failing to provide the petitioner with proper matters of comfort. Yet these acts may have been considered by the court acts which amounted to indignities. There is not charged in the petition any violence to the person of the petitioner, nor any abusive language, and yet, abuse is found as perpetrated by the defendant and his relations.

It may not be necessary here to pass upon the sufficiency of the petition, but it appears to be clear that the court, when finding abuse that is not charged, and acts said to be indignities, should have found, if not the acts in minute detail, at least the character of the acts, which, as indignities, are regarded by the court as a ground of divorce.

2. We do not regard a petition as sufficiently specific, under the statute, which only charges, in general terms, that one party offered to the other indignities which rendered his or her condition intolerable. The defendant is entitled to know with what he is charged in more particular language; and, in the present case, passing by the petition, we require that the finding of facts by the court, shall be more specific than the mere finding that the acts and abuse were indignities, without stating even the nature of the acts or the abuse.

The judgment is, with the concurrence of the other judges, reversed, and the cause remanded.

Freeland v. Freeland.

FREELAND, Respondent, vs. FREELAND, Appellant.

1. A petition for a divorce on the ground of the absence of the defendant for more than two years, must allege that the absence was without reasonable cause.

Appeal from Platte Circuit Court.

Hayden, for appellant. The petition does not state facts sufficient to warrant the decree. It states that the defendant left the plaintiff without cause, but does not state that she remained absent for two years without reasonable cause.

Vories and Gardenhire, for respondent.

GAMBLE, Judge, delivered the opinion of the court.

The petition filed by the husband for a divorce from his wife, states as the ground of the divorce, that she, on the 20th of October, 1850, left the plaintiff without any cause whatever on his part; "that said Rebecca has been absent from him for more than two years." Judgment having been given for the plaintiff, the case is brought to this court by appeal, and we examine the petition, to see whether it will support the judgment.

1. When absence of either party is charged by the other, as the ground of divorce, it must be such as the statute makes a cause of divorce. The words of the act are, "when either party has absented himself or herself, without a reasonable cause, for the space of two years." It is not alleged in the petition, that the absence was without a reasonable cause. It is true that it is alleged that the wife left the plaintiff on the 20th October, 1850, without any cause whatever, but the continued absence for two years is not connected with this departure, nor is it alleged that the continuance of the absence was without a reasonable cause.

Because the petition is insufficient to support the judgment, the judgment is, with the concurrence of the other judges, reversed, and the cause remanded.

Hooper v. Hooper.

HOOPER, Appellant, vs. HOOPER, Respondent.

1. Under the act of March 12, 1849, amendatory of the act of 1845, concerning divorces, it is not necessary that indignities, to be the ground of a divorce, should be offered to the person.
2. Under the act of March 12, 1849, amendatory of the act of 1845, the writing of a letter by a husband to his wife, declaring his determination never again to live with her, assigning no other reason than that she did not suit him, that he had been deceived in her, and that she had been guilty of improper conduct towards his relatives, is not an indignity which is a ground for a divorce.
3. Nor is the posting up of a notice by the husband, notifying all persons not to credit the wife, any ground for a divorce.
4. Abandonment without cause and refusal to provide for and support a wife is good ground for a decree for maintenance, under the ninth section of the act of 1845.

Appeal from Cass Circuit Court.

Gardenhire, for appellant. 1. The facts shown in the petition entitle the plaintiff to a divorce. In *Lewis v. Lewis*, 5 Mo. Rep. 278, this court decided that the charge of infidelity was such a personal indignity as was contemplated by the statute. In *Cheatham v. Cheatham*, 10 Mo. Rep. 296, this decision was overruled. At the next session of the general assembly, (in 1849,) the law was changed. The words "indignities to the other" were substituted for "indignities to the person of the other." The object of this change was to make the law what it was supposed to be in the case of *Lewis v. Lewis*. Abandonment and advertisement are as well calculated to render the condition of the wife intolerable, as the charge of infidelity. But if the facts stated in the petition are not sufficient for a divorce, they certainly entitle the plaintiff to a decree for maintenance, and on that account the demurrer ought to have been overruled. R. C. 1845, tit. "Divorces," sec. 9.

Hicks, for respondent. The petition does not specify any of the causes for a divorce enumerated in the act. Session acts of 1849. The letter contains no charges which are such

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indignities as the act contemplates. Advertisement is no ground for a divorce; nor is a mere threat of abandonment. It is conceded that, if the defendant had abandoned her and absented himself from her for two years, it would have been a ground for a divorce, under a clause in the first section of the act of 1846.

GAMBLE, Judge, delivered the opinion of the court.

The plaintiff, Susan W. Hooper, filed her petition for a divorce and for alimony, alleging that her husband, a few months after their marriage, and when he was absent from her at his father's residence, wrote a letter to her, in which he declared his determination never again to live with her, stating no other ground or reason for such determination, than that she did not suit him, and that he had been deceived in her, and that her improper manner toward his relations had occasioned him the loss of about a thousand dollars. The petition states also, that immediately after writing the letter, the husband caused several notices in writing to be posted up in the county, in which he notified all persons not to trust his wife, as he would not pay any debts she might contract. It is further alleged that he has carried out his declared purpose of not living with the complainant, and has, without any cause, abandoned her, and refused to maintain and provide for her. The petition alleges that the conduct of her husband was such as to render her condition wretched and intolerable, but this is stated without any other specification of misconduct on his part, than the letter and notice before mentioned. The husband filed a demurrer to the petition, which was sustained, and judgment given for the defendant.

1. Since the decision in *Cheatham v. Cheatham*, 10 Mo. Rep. 296, the act of 1845, upon the subject of divorces, has been somewhat modified by the act of March 12, 1849. Sess. acts, 1849. The first section of the act of 1845 prescribed the causes for which divorces might be granted, and among them was the offering of such indignities "*to the person*" of the

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complainant, as rendered his or her condition intolerable. Under this act, *Cheatham v. Cheatham* was decided, in which it was held, that the indignities for which a divorce might be granted, were in some way connected with the person of the party, and that the charge of moral delinquencies, however gross, was not a ground for a divorce. The act of 1849, which enumerates the causes of divorce, and repeals the first section of the act of 1845, which stated the causes of a divorce in that act, omits the words, "*to the person*," which were in the act of 1845, and declares that it shall be a cause of divorce that either party "shall offer such indignities to the other, as shall render his or her condition intolerable."

This act must be regarded as designed to change the law, as declared in *Cheatham v. Cheatham*, and to leave open for decision, in each case, the question, whether the acts complained of are such indignities as to render the condition of the complainant intolerable.

2. It is impossible to lay down any rules that will apply to all cases, in determining what indignities are grounds of divorce, because they render the condition of the injured party intolerable. The habits and feelings of different persons differ so much, that treatment which would produce the deepest distress with one would make but a slight impression upon the feelings of another. It is impossible, therefore, under the statute, to specify particular acts as the indignities for which divorces may, in all cases, be granted; for it is not possible to state the effect of such acts, in rendering the condition of all persons injured intolerable. The legislature chose to leave the subject at large, and by the general words employed, evidently designed to leave each case to be determined according to its own peculiar circumstances. In the present case, the conduct of the husband, in writing the letter to his wife, appears to be a wanton act of cruelty, but it was confined to her, and not published to the world. It could not be known to the world but through her own act; it charged her with no offence; it alleged no immoral act; it was but the expression of his deter-

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mination to abandon her, without giving any decent pretext for the act. It was not an indignity rendering her condition intolerable.

3. So, the notice to persons not to credit her, connected as it was with the abandonment on his part, was not in itself an indignity requiring a divorce to be granted. Although, in fact, such notices are often published, when the wife elopes from the home of the husband, yet here, there was no such accusation.

4. But the case presented by the petition is clearly one for the allowance of liberal support and maintenance to the wife, under the ninth section of the act of 1845, (R. C. 428.) That section provides, "that when the husband, without good cause, shall abandon his wife, and refuse or neglect to maintain and provide for her, the court shall decree such support and maintenance to be provided and paid by the husband," &c. The petition states a case which clearly comes within this provision of the statute, and states it with all the circumstances of wantonness in his abandonment, and of the destitution of the wife, which requires a decree to be made for support and maintenance. The demurrer, while it was well enough taken to so much of the petition as sought a divorce, should have been overruled, because the petition stated a case upon which the court should have made a decree in favor of the wife, under the ninth section of the act of 1845.

The judgment of the Circuit Court is, with the concurrence of the other judges, reversed, and the cause remanded.

RAMSOURS, Respondent, *vs.* CAMPBELL, Appellant.

1. In an action on a receipt which stated that the defendant had received from the plaintiff a demand for collection, and that he would either collect the same or return the evidence of it, a petition is sufficient which states that the defendant executed the receipt, that he had collected the money and had failed to pay the same to plaintiff, although there is no express averment that the defendant promised to pay the money when collected to the plaintiff, or that it belonged to the plaintiff.

Ramsours v. Campbell.

Appeal from Greene Circuit Court.

F. P. Wright, for appellant. The petition does not show that plaintiff is entitled to the money when collected, nor that the defendant promised to pay it to him. No contract or liability is shown.

GAMBLE, Judge, delivered the opinion of the court.

1. Ramsours held a receipt given to him by one Pegram, in which Pegram acknowledged to have received for collection a note for one hundred and fifty dollars, with a credit of fifty dollars, describing the note. Campbell obtained this receipt from Ramsours and gave him a receipt for it. In this receipt, Campbell acknowledged that the object in his getting the receipt was to collect the proceeds of the note from Pegram, and if not collected, the receipt was to be returned. This action was brought against Campbell on the receipt, and it was alleged in the petition that he had collected all the money, and that, with the exception of forty dollars, he had not paid it over, nor had he returned the receipt. Campbell answered, and his answer contained but a single denial, and no other defence. He denied that he had ever received any more of the money than the forty dollars, which, it was admitted, he had paid over. There was a trial by jury, and the instructions given upon the only point in issue, were as favorable to the defendant as he could have asked. There is here no complaint of the instructions. A motion in arrest of judgment was made, and a motion for a new trial. The motion in arrest of judgment presents the only question which has been discussed before us, and that rests upon the sufficiency of the petition. Campbell received Pegram's receipt from Ramsours, and received it for the purpose of collecting the money from Pegram, and he was to return the receipt, if the money was not collected. To whom was he to return the receipt? Clearly to Ramsours. To whom was he to pay the money, if it was collected? Clear-

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ly to Ramsours, when the whole transaction was with him, and when he was the owner of the receipt. The idea that there is no contract stated with Ramsours, and no consideration for a contract with him, is a mere mistake. We do not review the decision refusing a new trial. The judgment is, with the concurrence of the other judges, affirmed.

GLOVER'S ADMINISTRATORS, Defendants in Error, *vs.* DUHLE,
Plaintiff in Error.

1. It is error to instruct a jury to presume one fact from another fact proved, unless the presumption is one which the law raises.

Error to Cole Circuit Court.

Edwards, for plaintiff in error.

Gardenhire, for defendants in error.

RYLAND, Judge, delivered the opinion of the court.

The administrators of Glover sued Duhle on a note before a justice of the peace, and recovered judgment, from which the defendant appealed. On the trial in the Circuit Court, the defendant relied upon payment as a defence. He introduced evidence, that after he had given the note to Glover, he had worked for Glover, and Glover had paid him for his work. The court gave to the jury two instructions, the first of which is in these words: "If, after the execution of the note sued upon, Glover employed Duhle to work for him and paid him for it, it is *sufficient* evidence to authorize a verdict for defendant."

1. This little case presents a form of instruction which is continually coming before this court, and which is improper. Whenever a fact is, by law, presumed from another fact, it is the province of the court to tell the jury that, the first fact being found by them, the other fact presumed by the law is to be

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taken to exist. But whenever the fact in dispute is attempted to be proved by the proof of circumstances, from which the law draws no conclusion as to the disputed fact, the sufficiency of the circumstances to establish the main fact, is entirely a question for the jury. In this case, it was not a presumption of law that the note was paid, because Glover employed the defendant to work for him after the note was given, and paid him for his work, although those circumstances might be very strong evidence of the fact. The instruction which told the jury that such circumstances were sufficient evidence to authorize a verdict for the defendant, was an instruction calculated to mislead the jury, by giving them the idea that the law required such conclusion from the facts proved.

It is true that the instruction only says that the facts stated authorized a verdict for the defendant; yet that, coming from the court as an instruction, would be understood as a declaration of law that, from certain facts, a certain conclusion must be drawn. It has become a practice in some courts, to string together in an instruction, certain facts culled from the mass to which the evidence applies, and to tell the jury that, if they believe those facts, "they may find," or "they are warranted in finding" a verdict for the party asking the instruction, or they may find a certain other fact which is in dispute. If a verdict for the party asking the instruction is a legal consequence of the facts stated, or the main fact in dispute is one presumed by the law from the facts stated, then let the jury be so told, and the instruction will be really an instruction on the law.

In the present case, where the evidence is all on one side, and the circumstances relied on to prove payment are strong, the jury might have been trusted to draw their own conclusions on the question of payment from the facts in evidence. The judgment is, with the concurrence of Judge Gamble, reversed, and the cause remanded.

Keeton v. Audsley.

KEETON, Respondent, vs. AUDSLEY, Appellant.

1. An entry of public land gives no title to timber cut and lying upon the land at the time of entry.

Appeal from Saline Circuit Court.

Hayden, for appellant. Keeton, by his entry of the land, acquired no title to timber cut prior to the entry. The timber remained the property of the United States, and the injury, if any, done by Audsley, was to the United States, and not to Keeton. The cases of *Turley v. Tucker*, 6 Mo. Rep. 583, and *Gale v. Davis*, 7 Mo. Rep. are consistent with this position. The plaintiff cannot recover any damages for a mere breach of his close, because he does not claim any in his petition, nor was there any evidence that his close was broken.

Napton, for respondent, relied upon *Gale v. Davis*, 7 Mo. Rep. 545.

SCOTT, Judge, delivered the opinion of the court.

This was an action for wrongfully entering upon the plaintiff's land, and for cutting timber and carrying it away. The answer consisted of a denial of the matters stated in the petition. The facts were, that Audsley, the defendant, had a set of house logs cut upon the public land, and afterwards Keeton, the plaintiff, entered the land, and Audsley, after Keeton's entry, hauled the logs away. There was no evidence in the cause on which any instruction could be based, relative to the right of the plaintiff to any portion of the land by accretion.

The court gave the following instruction, asked by the plaintiff: "If the jury believe from the evidence, that the defendant entered upon fractional section, south of the Missouri river, numbered twenty-one, in township fifty-three, (53,) range 20, and carried away timber or house logs, cut and lying on said land, they will find for the plaintiff; provided they are

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satisfied from the evidence, that said fractional section has been and was, at the time of said entry and carrying off said logs, the property of plaintiff; and notwithstanding they may also believe said logs were cut upon said land, prior to the entry thereof by the plaintiff." And refused the following instructions asked by defendant: "That, to enable the plaintiff to recover in this action, it devolves upon him to show to the jury that the defendant cut and carried away the timber of the plaintiff, as stated in his petition."

"That, if they find from the evidence, that the defendant procured Ira Tilman to cut and hew the house logs mentioned by the witnesses, before the plaintiff entered or purchased the land of the United States, and that the defendant, *after* the purchase by plaintiff, hauled the logs from and off of the land, then the plaintiff cannot recover of the defendant any damages for the timber or the logs so hauled off of the land by the defendant."

"That in this case, the plaintiff has not claimed of the defendant any damages for an injury to his, plaintiff's land, by reason of the mere entry upon and return of his wagon and team upon his land, and therefore, the plaintiff cannot recover of defendant any damages therefor."

1. The action is for entering on land and cutting timber and carrying it away. The word "timber," in common parlance, is applied to standing trees, and to wood proper for buildings, utensils, furniture, ships, &c. Yet, in law, timber means certain trees useful for building, or the like. Taking the word in its popular sense, when it is used in connection with the word "cut," it is understood usually to apply to standing trees. When we say, one cut timber on another's land, the ordinary understanding of the language is, that trees were cut down. These observations are made, because the instruction given for the plaintiff would seem to substitute a matter in aggravation of damages different from that stated in the petition. We are not aware of any principle which would give damages to the plaintiff for house logs cut upon the land before he entered it.

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He may maintain trespass *quare clausum fregit*, for entering his close, and recover damages for the injury sustained by such entry, but that those damages can be increased by proof that house logs were taken from the land, which had been cut before the land was purchased from the United States, is a proposition unsustained by any principle of which we are aware. In the case of *James & Massey v. Snelson*, 3 Mo. Rep., it was held that, where cord wood was cut upon public land by one, and the land was afterwards entered by another, the person who cut the wood might maintain trover for it against the purchaser of the land, who refused to deliver it up. It has been supposed that this case was overruled by the subsequent one of *Turley v. Tucker*, 6 Mo. Rep., where it was decided that one who had cut saw logs on the public land, could not maintain an action for the logs against another who went upon the land and took them away. The property in the logs remained in the United States, and the trespasser gained no title by cutting down the trees. *Gale v. Davis*, 7 Mo. Rep., was an action of trespass *quare clausum fregit*, for entering a close, and removing a worm fence. After the entry of the land by Davis, Gale went on it and removed a rail fence, which he had built upon it. The question in that case was, whether Davis, before actual entry and possession, could maintain an action of trespass *quare clausum fregit*. It was held, that the action could be maintained, and the worm fence being a part of the freehold, and annexed to it, no question was made about his right to damages for removing it, if the action could be maintained at all, before an actual entry and possession. In the case of *Bower v. Higbee*, 9 Mo. Rep., it was held, that one claiming a right of preëmption, under the act of congress of the 1st June, 1840, could not maintain an action of replevin for timber cut upon the land, before his right of preëmption was proved up. None of these cases maintain the principle assumed by the instruction given by the court for the plaintiff, that house logs cut upon land, before it was entered, belong to the purchaser of the land. They were severed from the

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freehold and formed no part of the land. They do not pass with the land as a part of it, when a conveyance is made. *Wincher v. Shewsbury*, 2 Scammon, 284. *Johnson v. Barber*, 5 Gilman, 431. *Basset v. Maynard*, 1 Croke, 819. *Leford's case*, 11 Coke 50, (b.) *Farrant v. Thompson*, 7 Eng. Com. Law, 272. *Movers v. Waite*, 3 Wend. 104. *Buck v. Aikin*, 1 Wend. 468.

From what has been said, it follows that the second instruction asked by the defendant should have been given.

The other judges concurring, the judgment will be reversed and the cause remanded.

CROWTHER, Respondent, vs. GIBSON, Appellant.

1. Declarations which would otherwise be inadmissible in evidence may become so when they are part of a transaction, evidence of which is admissible.

Appeal from Cooper Circuit Court.

Hayden, for appellant. Evidence of the declarations of the plaintiff's son was inadmissible. The plaintiff could not be permitted to prove the veracity of her own witness, by showing that, previous to the trial, he had made statements which corresponded with his testimony at the trial. 1 Greenleaf's Ev. §469. 1 Phill. Ev. chap. 8, p. 3 and 7 *et seq.* (3d Am. from 3d London ed.) Buller's N. P. 294. 1 Peters' C. C. R. 203. Note 533 to 2d vol. Phill. on Ev. by Cowan & Hill, p. 776-7-8, and authorities there cited. It cannot be said that the declarations were a part of the *res gestae*, because the defendant was not present, and could not be affected by the transaction, or the declarations accompanying it.

Leonard and *Adams*, for respondent. The declarations of plaintiff's son, while he was making the horse kneel, were

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admissible as contemporaneous with and illustrative of the fact. They were made *dum fervet opus*. 1 Greenleaf's Ev. §108, 109.

SCOTT, Judge, delivered the opinion of the court.

This was an action for a horse, which was claimed by both of the parties to the suit. The dispute was, whether a horse in the possession of the defendant, which he had purchased, was the horse of the plaintiff, which had strayed from her. A witness for the plaintiff, her son, testified that he had learned the plaintiff's pony to kneel, by taking hold of the bridle, touching him on the knee, and commanding him, by his name, (Charley,) to kneel; that the pony in the possession of the defendant, claimed by his mother (the plaintiff) would perform that feat; that he had tried him in the presence of Wm. Simpson and M. Hogan, and the pony knelt at his command, as he had always done before.

The aforementioned Wm. Simpson was afterwards called as a witness: he testified that the defendant had left the pony with his dray driver, to be broken to the draught; that the plaintiff and her son, the witness, above referred to, came to see the pony, and claimed him as her property. The plaintiff's counsel then asked the witness if Crowther, the son of the plaintiff, made the pony perform any feat, and if, at the time he did so, he spoke of having learned the pony such tricks, by which he could tell him. The defendant objected to this question, but his objection was overruled, and he excepted. The witness then stated that when the plaintiff and her son, the witness, looked at the pony, young Crowther stated that, if the pony was his mother's, he could make it kneel; that he had learned his mother's pony to kneel by taking hold of the bridle and touching him on the knee and commanding him, by his name, to do so; and after the statement, young Crowther made the pony do just as he had said he would do. As soon as he took hold of the bridle and commanded the pony to kneel, touching him on the knee, he knelt. The verdict was for the plaintiff.

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1. The only point in the case is, the propriety of the admission in evidence of the statement of young Crowther, testified to by the witness, Simpson, as to what the pony would do. It was contended for the defendant, that the evidence objected to was inadmissible, under the rule which excludes testimony of the witness having made, on previous occasions, statements similar to that made on the trial, unless his veracity has been first attacked; that it was hearsay evidence given by the witness, Simpson, of the acts and declarations done and made by young Crowther in the presence of the witness, previous to the trial of the cause, when he was not upon oath, and in the absence of the defendant, for the purpose of corroborating testimony which said Crowther had before given.

It is clear that evidence that a witness has on previous occasions made a statement similar to that he has testified to on the trial, is not admissible in corroboration of his testimony, unless when a design to misrepresent is charged upon him, in consequence of his relation to the party or cause. 9 Mo. Rep. 812. But we conceive that the question before the court is not affected by this principle. It is clear that the testimony of young Crowther was admissible. There could be no legal objection to it. But it is insisted, that the testimony of Simpson, as to the declarations of Crowther, in relation to the feats the pony could perform, were inadmissible. There are cases in which declarations or confessions would be inadmissible in themselves, yet they become evidence, when facts are shown which corroborate the declaration or confession. An extorted confession of one charged with crime is inadmissible evidence, but if, in consequence of such confession, the property stolen, or the bloody clothes of the person murdered, are discovered, it is competent to show that such discovery was made conformably to the information given by the prisoner. A slave cannot testify against a white person, yet the questions put by a slave to her mistress, respecting the murder of her husband, with which she was charged, were allowed in evidence when proved by a white person, in order that the answers made thereto

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by the accused might be received and explained. *Hawkins v. State*, 7 Mo. Rep. 190. The declaration by Crowther, in relation to the feat the pony would perform, was a part of the transaction witnessed by Simpson, and without it, the act would have been unmeaning, as not tending to identify the horse in dispute; whereas, with it, the feat performed was the strongest evidence of identity that could have been given. That Crowther had previously testified to the same fact, was no reason for rejecting the evidence of Simpson. Nothing is more usual on trials than to introduce several witnesses testifying to the same fact. The objection that the verdict is against the weight of evidence, cannot avail here. This is so well settled a rule, that it is useless to refer to instances in which this court has refused to disturb judgments for such cause.

The other judges concurring, the judgment will be affirmed.

DUNCAN'S ADM'R, Appellant, vs. DUNCAN, Respondent.

1. A statement in a petition that the plaintiff sued in the capacity of administratrix was held a sufficient allegation that she was administratrix.

Appeal from Buchanan Circuit Court.

Vories, for appellant.

Gardenhire, for respondent.

GAMBLE, Judge, delivered the opinion of the court.

1. The plaintiff, styling herself in the petition, administratrix of all and singular, the goods, chattels and effects of Robert Duncan, deceased, commenced her civil action against the defendant, upon a note alleged to have been made by the defendant to the intestate, and upon an account due from the defendant to the intestate, praying judgment as administratrix. The defendant answered, denying a part of the indebtedness, and

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setting up, as an off-set, a demand which he held upon the intestate. There was a replication to the off-set. At the trial, the plaintiff offered in evidence the record of her letters of administration upon the estate of the intestate, which was rejected. She then offered in evidence the note made by the defendant to the intestate, which was rejected. The rejection of the evidence is the ground of complaint here. The ground of the rejection was, that the petition did not sufficiently allege that she was administratrix. The petition stating the character in which the plaintiff sued (as administratrix) and the indebtedness to her intestate, and praying judgment as administratrix for the debt, is a sufficient statement of the cause of action, and of her right to sue, "in such manner as to enable a person of common understanding to know what is intended." Code, art. 6, sec. 1. And being such statement, the plaintiff was entitled to prove it, by giving her letters in evidence. The judgment is, with the concurrence of the other judges, reversed, and the cause remanded.

THE STATE, TO THE USE OF RUSSELL & WIFE, Plaintiff in Error, vs. MOORE *et al.*, Defendants in Error.

1. A suit upon a sheriff's bond is properly brought in the name of the state.
2. A sheriff is responsible for all trespasses committed by a deputy by color of his office.
3. The securities in a sheriff's bond are liable for a trespass committed by the sheriff, in seizing property exempt from execution.

Error to Chariton Circuit Court.

This was an action brought under the code, in the name of the state of Missouri, to the use of William Russell and Sarah J., his wife, against Robertson Moore and others, upon a bond executed by Moore as principal, and the other defendants, as his securities, conditioned that Moore should faithfully perform

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his duties as sheriff of Chariton county, according to law. The breach of the bond was charged in the petition substantially as follows :

On the 25th of November, 1848, a suit was commenced in Chariton county by George W. Temple against Sarah J. Cochran, who has since intermarried with the plaintiff, William Russell, and a writ of attachment issued, which was levied upon the goods and effects of the said Sarah J. to the value of \$9454 49. The sheriff, by his deputies, took the goods into his possession, and kept them so negligently that they were all lost, stolen, destroyed or injured except the amount in value of \$1149 72. The sheriff also seized and took into his possession the wearing apparel of the said Sarah J., by which she was damaged to the amount of \$2000. At the September term of the Chariton Circuit Court, the said sheriff was directed and ordered by the court to deliver to the said Sarah J. the goods, &c., seized by him, the suit having terminated in her favor. This was the substance of all the material allegations in the petition. The damages were laid at \$8000. A demurrer to this petition was sustained, and the plaintiffs appealed.

Davis, for plaintiff in error. 1. The suit is brought in the name of the proper party. Code of Practice, art. 1, sec. 3. 2. The securities of Moore are liable for all damages occasioned by him under color of, and in discharge of his official duties as sheriff. 13 Mo. Rep. 437. 15 Wend. 577. 7 J. J. Marsh. 166. 3. No demand or order of court for the return of the property was necessary.

Clark, for defendants in error. 1. The code requires that all suits shall be brought in the name of the real party in interest, with certain exceptions, of which this is not one. 2. The petition joins a cause of action for which the sheriff alone is liable, with one for which the sheriff and his securities are liable. The securities in a sheriff's bond are not liable for his trespasses. 8 Pick. 543. 16 Pick. 19. 11 Mo. Rep. 13. 8 Mass. Rep. 79. 1 Binney, 240. 7 Cowen, 739. 18 J. R. 390. 3. The petition does not show that any demand was ever made on

the sheriff for the return of the property, or that he was notified of the result of the suit or of the order of the court.

SCOTT, Judge, delivered the opinion of the court.

1. The first ground of demurrer to the plaintiff's petition is, that the proper parties are not made plaintiffs. It is maintained that the suit should have been brought in the name of Wm. Russell and his wife, they being the real parties in interest, and not in the name of the state of Missouri. 'The action is on a sheriff's bond, which is, by law, made payable to the state of Missouri, and is against the sheriff and his sureties. In the construction of the present practice act, it has been held, that the obligee of a bond, and the payee of a note are the proper persons in whose names suits should be instituted on such instruments. They are the trustees of an express trust within the exception of the act. *Harney v. Dutcher*, 15 Mo. Rep. 91.

Another objection to the petition is, that a cause of action which lies against the sheriff alone, is joined with one against both him and his sureties. It is alleged in the petition, as a breach of the condition of the bond, that the sheriff levied an attachment on property belonging to the plaintiff's wife, which was not liable to that process under the statute regulating attachments. Other breaches of the condition of the bond are likewise averred in the petition, for which it is conceded the sheriff and sureties would be jointly liable. It is argued for the defendant that, for such wrongful acts of the sheriff, the sureties in his official bond are not responsible—that the act constituted a trespass for which the sheriff alone is liable.

2. It is an undoubted principle, that the master is not liable for the wanton acts of those whom he may employ. If an agent, transcending the limits of his authority, wantonly commits a trespass, his principal is not liable to an action for such wrong; but the sheriff is liable for all acts done by his deputy, as such; for all abuses, for every perversion of the authority with which he is entrusted, he is liable, though they may

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be committed by his deputies. He is responsible for all trespasses done by a deputy, by color of his office. This is a well established principle. 16 Bacon, tit. "Sheriff," 156.

3. The law of attachments relieves from that process all property exempt from execution by law, in favor of those who are residents of this state. Trespass lies against an officer for seizing under process property exempt from execution. Are, then, the sureties of a sheriff liable for trespass committed in the execution of process in his hands? The sheriff's bond is conditioned for the faithful discharge of the duties of his office. Is it a faithful discharge of his duty to pervert process placed in his hands, to the injury or oppression of another? The office of sheriff is a very important one. He is entrusted with very great powers, and for the safety of individuals, the law, in its wisdom, has seen proper to require of him surety for his good conduct. It would be hard, if a sheriff, by virtue of the process placed in his hands, should oppress or ruin individuals, and they should have no other security than his own resources. He may be insolvent, and unable to respond in damages out of his own estate. Such a condition of things would drive men to a resistance of the execution of the process of the law. We are not without authority on this question. In the case of the *Commonwealth v. Stockton and his sureties*, 5 Monroe, 193, it was held, that a person on whose property a sheriff levies an execution against another, may have an action for his use on the sheriff's official bond against the sheriff and his sureties. So, in the case of *Carmack v. The Commonwealth*, 5 Binney, 184, it was decided that the sureties of a sheriff are liable in damages for the sheriff's trespass, in seizing and selling goods of one under execution against another. The condition of the bond sued on in that case was substantially the same as that required by our law.

The objection that there was no order of the court requiring the sheriff to restore the attached property, and that there was no demand of the property before the institution of the suit,

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cannot be sustained, as the action is founded on the allegation of injuries sustained by the loss and destruction of property, whilst in the custody of the sheriff. Under such a state of facts, no order for the demand or delivery of the goods was necessary, as such steps would have been nugatory.

The other judges concurring, the judgment will be reversed, and the cause remanded.

THE STATE, TO THE USE OF HAYS' ADMINISTRATOR, Respondent, vs. PETTICREW'S EXECUTOR, Appellant.

1. A referee need not report his decision in admitting or rejecting a witness or testimony, unless required so to do by the order of reference.
2. In an action against the executor of an executor upon the latter's bond, it is necessary that the declaration should allege that neither the executor, in his life time, *nor his executor since*, have performed the act required by law or the order of the court. Such an allegation will not make the declaration bad for a misjoinder of actions.

Appeal from Chariton Circuit Court.

Abell & Stringfellow, for appellant. 1. It was the duty of the referee to report the evidence offered, and his action in receiving or rejecting it. 2. The declaration is fatally defective, in uniting causes of action arising before the death of Petticrew and since the administration of Williams—causes of action against the executor as such, and against him personally. This defect is not cured by the verdict. 1 Chitty's Pl. 235, 236.

Morrow, for respondent.

SCOTT, Judge, delivered the opinion of the court.

1. This cause was begun before the late practice act went into effect. The court, against the consent of the parties, had authority, under the 24th section of the fifth article of the act

concerning practice at law, to make a reference of the cause, as its trial required the examination of a long account. The order of reference directed that the referee should hear and decide the whole issue between the parties, and make report thereof to the next term of the court. There was no order made pursuant to the thirty-second section of the act concerning arbitrations and references, requiring the referee to report his decision in admitting or rejecting any witness, or the deposition of any witness or other testimony and other matters mentioned in that section. The report of the referee shows that objections to the admission and rejection of evidence were made, but nothing of the evidence is preserved in the bill of exceptions. Neither party having moved the court to require this report, all cause of complaint is removed.

2. We do not see any foundation for the objection that there is a misjoinder of action. The suit is brought against the executor of Petticrew, who himself was executor of Robert Hays, by an administrator *de bonis non* of said Hays.

The declaration avers that an order of the county court was made on the defendant, Williams, as executor, to pay and to deliver over to the plaintiff, Allen, as administrator *de bonis non* of Hays, all the moneys, evidences of debt, books and papers, and all the real and personal estate belonging to the succession of the said Hays. There is, then, an allegation that, neither Petticrew, in his life-time, nor his executor after his decease, did make a true inventory, faithfully execute the last will and testament of the said Robert Hays, nor render just accounts, nor perform and do every thing required by law or the order of the court; nor did he pay or deliver over to Thos. H. Allen, as administrator as aforesaid nor otherwise, all, nor any of the moneys, evidences of debt, books, papers and other property, which were of said Hays, at the time of his death, but so to do, they, the said Petticrew, in his life-time, and the said Williams, since the said Petticrew's death, have thereto wholly failed. The suit having been brought on the bond of Petticrew, as executor, to constitute a breach, it was necessa-

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ry to allege that neither Petticrew, in his life-time, nor his executor since, had performed the acts required by law, or the order of the court. The averment amounts to nothing more than the usual allegation in all declarations on bonds of deceased persons, that neither the testator, in his life-time, nor his executor since his decease, has paid the same. The declaration no where seeks to render the defendant liable in his individual capacity. The averment that the defendant was required, by the order of the county court, to pay over to the successor of Petticrew, as the representative of Hays, does not change the matter. He was already under obligation to do it, and the order of the court must be regarded as merely cumulative. It is alleged as an additional motive why the defendant should have complied with the condition of the bond of his testator, Petticrew. If there was no breach of the condition of his bond in the life-time of Petticrew, his executor could have saved one, by a compliance with its conditions after his death. The objection is founded on a misconception of the declaration.

The other judges concurring, the judgment will be affirmed.

THE STATE, Plaintiff in Error, *vs.* LEAPFOOT, Defendant in Error.

1. The supreme court will not reverse a judgment in a criminal case for error committed by the inferior court in quashing one count of an indictment, where the record shows that the defendant has been tried and acquitted on the remaining count or counts.

Error to Moniteau Circuit Court.

Gardenhire, attorney general, for the State. The second count of the indictment is good, and ought not to have been quashed. It is in the language of the statute, and is as certain as it is. This case comes within the principle of the *States v. Ames*, 1 Mo. Rep. 372. *Page v. State*, 6 Mo.

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Rep. 205. *Grave v. State*, 10 Mo. Rep. 232, and *State v. Ladd*, 15 Mo. Rep. 430. The charge of dealing with a slave, without circumstance, is as certain and definite as the charge of betting at a faro bank.

Parsons, for defendant in error. 1. It is not sufficient to charge the offence in the words of the statute. The word "dealing" is too latitudinous to inform the defendant what particular violation of law he is called upon to answer. *Page v. State*, 6 Mo. Rep. 205-6. *State v. Black*, 9 ib. 689. 10 ib. 500. 2. The indictment does not set out the name of the slave, or of the master or owner thereof.

RYLAND, Judge, delivered the opinion of the court.

The defendant, Leapfoot, was indicted by the grand jury at the March term of the Moniteau Circuit Court, in the year 1853, for selling spiritous liquors to a slave, named Dade, belonging to one Jacob C. Longan, without permission in writing from the master, owner or overseer of said slave, &c.

The indictment contained two counts; the first as above set forth, and the second count charged "that the defendant unlawfully did deal with a slave, to the jurors aforesaid unknown, without the consent, in writing, of the master, owner or overseer of said slave first had and obtained, contrary," &c.

The defendant appeared to this indictment, and moved the court to quash the second count. The court sustained this motion and quashed the second count. The attorney general excepted to this judgment of the court in quashing this count. The defendant then filed his plea of "not guilty" to the remaining count in the indictment, there being but one. Upon this issue he was tried, and the jury found the defendant not guilty. The State brings the case here by writ of error, and complains of the judgment of the court below, in quashing the second count of the indictment.

1. This court will not reverse a judgment in a criminal case, for error committed by the court below, in quashing one count

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of an indictment, when the record shows there has been a trial had on the remaining count of the indictment, and a verdict and judgment thereon for the defendant. It will not be necessary, therefore, for us to say any thing, in regard to the second count of this indictment.

The judgment below is affirmed, Judge Scott concurring; Judge Gamble not present.

THE STATE, Appellant, *vs.* HERRYFORD, Respondent.

1. Cards are a gambling device within the meaning of the fifteenth section of the eighth article of the act concerning crimes and punishments.

Appeal from Chariton Circuit Court.

Gardenhire, (attorney general,) for the state.

RYLAND, Judge, delivered the opinion of the court.

At the March term, in the year eighteen hundred and fifty-three, of the Circuit Court within and for the county of Chariton, the grand jury indicted James Herryford for keeping a gaming house. At the September term of said court following, the defendant appeared and filed his motion to quash the indictment.

This motion was sustained by the court; the indictment was quashed; the circuit attorney excepted to the opinion of the court, in sustaining the motion and quashing the indictment; tendered his bill of exceptions, and brings the case here by writ of error. The indictment charges that the defendant, Herryford, on, &c., at, &c., with force and arms, did wilfully permit a certain gambling device, commonly called cards, adapted, devised and designed for the purpose of playing at games of chance for money and property, to be then and there used for the purpose of gaming, in a certain house, then and

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there being situate, of which said house, he, the said James Herryford, then and there had the possession; and that he, the said James Herryford, then and there, in said house, in his possession, as aforesaid, knowingly and unlawfully did, then and there, permit games of chance to be then and there played at and upon the said gambling device, for money, upon which said game of chance, so played, money, to-wit, the sum of one dollar, was then and there bet, won and lost, contrary to the form, &c. The question before us involves the sufficiency of the indictment. If it be sufficient, the court erred in sustaining the motion to quash; if it be insufficient, then the judgment below is correct.

1. The indictment is found under the 17th section of the 8th article of the act concerning crimes and punishments, (R. C. 1845, p. 402,) which section is as follows: "Every person who shall permit any gaming table, bank or device, prohibited by the 15th section (of the same act) to be set up or used for the purpose of gaming, in any house, building, &c., or other premises to him belonging, or by him occupied, or of which he hath, at the time, the possession or control, shall, on conviction, be adjudged guilty, &c.

The 15th section referred to is as follows: "Every person who shall set up or keep any table or gambling device, commonly called A. B. C., faro bank, E. O., roulette, equality, or any kind of gambling table or gambling device, adapted, devised and designed for the purpose of playing any game of chance for money or property," &c.

The indictment in this case charges that defendant did permit a certain gambling device, commonly called cards, adapted, devised and designed for the purpose of playing at games of chance for money or property, to be used for the purpose of gaming, in a house of which the defendant had the possession, and that he knowingly and unlawfully did permit games of chance to be played at and upon said gambling device, &c., and that upon said games money was bet, won and lost, &c., averring the amount.

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There is no doubt that cards are a gambling device, within the meaning of the 15th section of the act concerning crimes and punishments, above cited, and that the use of this gambling device, for the purpose of playing games of chance for money or property, is prohibited in the 17th section.

In the opinion of this court, the indictment in this case is sufficiently certain and explicit, and is substantially good. See *State v. Ellis*, 4 Mo. Rep. 474.

The Circuit Court erred in sustaining the motion to quash; its judgment is reversed, and this cause is remanded for further proceedings, in accordance with this opinion; the other judges concurring.



THE STATE, Plaintiff in Error, *vs.* SOOT *et al.*, Defendants
in Error.

1. An indictment of a white person for being present at an unlawful meeting of slaves, must state the facts which constitute the meeting unlawful.

Error to Chariton Circuit Court.

Gardenhire, (attorney general,) for the state.

Davis, for defendant in error.

GAMBLE, Judge, delivered the opinion of the court.

The defendants were indicted for being present in company of slaves at an unlawful meeting, and in the indictment it is charged that the meeting was at the house of Thomas Plemmons, in the night of a particular day, and that it continued for two hours. The meeting is, several times in the indictment, called "an unlawful meeting," but it is no where said what constituted it such. The indictment is under the 25th section of article one of the act concerning slaves, (R. C. 1017,) which provides for the punishment of white persons and

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free negroes and mulattoes found in company of slaves at unlawful meetings.

The section of the act which prohibits meetings of slaves, and to which the 25th section refers, is the 24th section, which provides for punishing the owner or overseer of a plantation or tenement, who shall permit or suffer more than five slaves, other than his own, to be and remain upon his plantation or tenement at any one time, without the consent of the owner or overseer of such slaves, unless such slaves have met together on Sunday, at public worship, or on any other day for the purpose of laboring, or some other lawful purpose.

1. The indictment of a white person for being found at an unlawful meeting of slaves, must describe the meeting in the terms which are used by the law in prohibiting such meetings, so that all the particulars which make it an unlawful meeting, shall be charged in the indictment. The present indictment is defective, in not alleging that the meeting was an unlawful meeting, in the language of the twenty-fourth section. The Circuit Court therefore properly quashed it, and the judgment is, with the concurrence of the other judges, affirmed.

THE STATE, Defendant in Error, *vs.* FIERLINE, Plaintiff in Error.

1. On the trial of a party indicted for selling liquor in less quantity than one quart without a license, evidence that he had sold at a time different from that charged in the indictment was held inadmissible for any purpose.

Error to Cole Circuit Court.

Parsons, for plaintiff in error.

Gardenhire (attorney general,) for the State.

SCOTT, Judge, delivered the opinion of the court.

This was an indictment for selling beer in less quantities than a quart, to be drank at the place of sale, without license.

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On the trial, a witness testified that he did not recollect of having bought, or of having seen any one buy beer at defendant's house, within one year previous to the finding of the indictment. The State then asked the witness, "have you ever seen, in your whole life, any beer bought at the defendant's house." This question was objected to, but the objection was overruled, and the defendant excepted. The witness then answered the question in the affirmative.

The testimony against the defendant not being positive, the court, among other instructions, was requested to direct the jury that, if from the evidence, they have a reasonable doubt of the defendant's guilt, they will acquit him. This the court refused to give, but instructed the jury that, if they believe from the evidence, that the defendant is guilty, they will find him so; if they believe from the evidence that he is not guilty, they will so find; and if they are unable to find from the evidence whether he is guilty or not, they will acquit. The defendant was found guilty.

1. We are of opinion, that the court should not have permitted the question to be put to the witness. The obvious effect of the answer was to prejudice the defendant's cause, by the introduction of improper evidence. It was convicting him of one offence by proving that he had previously committed a like offence. The impropriety of such a question becomes glaring, if we but suppose it to be asked on trials for the higher offences. A witness on the trial of one charged with murder would not be permitted to testify that a like crime had been formerly committed by the accused. It may be said, that the question was put with no such view, but was a mode of examination adopted in order to wring the truth from an unwilling witness. We cannot deal with the motives which prompt questions; we only look at the effect of the answers they produce. When a fact to be obtained by a question is inadmissible, the question should not be asked, whatever may be the motive which prompts it. Much latitude is allowed in examining an unwilling wit-

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ness, but care should be taken that no questions be asked, the answers to which would be inadmissible evidence.

The substitute given by the court for the instruction asked, did not cover the ground of the refused instruction; the evidence in the cause not being conclusive, it was a fair one for the instruction that was asked.

Judge Ryland concurring, the judgment will be reversed, and the cause remanded; Judge Gamble absent.

THE STATE, Defendant in Error, *vs.* RUTHVEN, Plaintiff in Error.

1. A writ of error does not lie to the action of the court upon a special plea, or a motion to discharge in a criminal case, until final judgment.

Error to Cole Circuit Court.

Morrow, Edwards and Parsons, for plaintiff in error. The discharge of the juries by the court, without the consent of the defendant, before the end of the term, was a bar to all subsequent proceedings. The special plea therefore, was good, or at least the motion for a discharge should have been sustained. It is not necessary for the defendant to wait for a verdict before a writ of error will lie. The very matter of which he complains is, that he cannot get a verdict, because the court discharges the juries empaneled to try him.

Gardenhire, for defendant in error, was stopped by the court.

GAMBLE, Judge, delivered the opinion of the court.

The defendant stands indicted in the Circuit Court of Cole county, for murder. A jury was empaneled to try the case, and, without the consent of the defendant, and before the end of the term, they were discharged by the court, and the cause

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continued. At a subsequent term, the defendant endeavored to avail himself of the act of the court in discharging the jury by a special plea, setting up the fact as a bar to all further prosecution of the indictment. To this plea, there was a demurrer, which was sustained. A motion was made to discharge defendant, which was overruled. Again, a jury was empaneled to try the case, and after hearing the evidence and retiring from the bar to consider of their verdict, they were discharged by the court before the end of the term, and without the consent of the defendant, because of the sickness of one of the jurors. The defendant again moved to be discharged, and the motion was overruled, and the cause now stands continued in the Circuit Court. The defendant has sued out his writ of error, in order to have the action of the court on his motions for discharge and his special pleas reviewed by this court.

1. Writs of error and appeals are allowed in all criminal cases, but neither in civil nor criminal cases does a writ of error lie to any other than a final judgment. R. C. 888, section 1. There is in this case no final judgment. The writ of error is, with the concurrence of all the judges, dismissed.

THE STATE, Appellant, vs. DEROSSETT, Respondent.

1. After the defendant was convicted for unlawfully killing a stray which he had taken up, the judgment was held properly arrested, because the indictment did not sufficiently state that the defendant did the killing.

Appeal from Polk Circuit Court.

Gardenhire, (attorney general,) for the State.

F. P. Wright, for respondent.

RYLAND, Judge, delivered the opinion of the court.

The grand jury indicted Derossett at the April term, 1853, of the Circuit Court within and for the county of Polk. At

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the October term following, Derossett appeared, and plead to the indictment, "not guilty;" a jury was empaneled to try the issue thus made, who found the defendant guilty; but failing to assess his punishment, the court assessed his fine at the sum of twenty dollars. The defendant moved in arrest of judgment, assigning the insufficiency of the indictment. This motion the court sustained. The circuit attorney excepted to the opinion of the court, and brings the case here by appeal. The indictment is as follows: "The grand jurors for the state of Missouri, empaneled, charged and sworn to inquire within and for the body of the county of Polk aforesaid, upon their oath present, that John Derossett, late of the county of Polk aforesaid, on the tenth day of November, in the year of our Lord, eighteen hundred and fifty-two, did then and there, to wit, at the county of Polk aforesaid, take up as a stray one bull, and had then and there the same valued and posted according to law, before J. K. Dial, a justice of the peace for said county, at the county aforesaid, before the expiration of one year from said tenth day of November, in the year aforesaid, at the county aforesaid, kill said bull, and convert him to his own use, contrary," &c.

1. This indictment is not good and sufficient in law. It is materially and fatally defective. The averment that the bull was killed, does not charge the defendant with the act. We are left to conjecture by whom the killing was done. The court, therefore, properly arrested the judgment, and, by the concurrence of the other judges, its judgment is affirmed.

THE STATE, Appellant, vs. WILLIAMSON, Respondent.

1. No person can sell liquor to be drank at the place of sale without a license.

Appeal from Laclede Circuit Court.

Gardenhire, (attorney general,) for the State.

There was no appearance for the respondent.

RYLAND, Judge, delivered the opinion of the court.

The grand jury indicted John Williamson at the October term of the Circuit Court for Laclede county, in the year eighteen hundred and fifty-two, for selling intoxicating liquor, and suffering it to be drank at the place of sale, without license. At the April term of the court following, the defendant filed his motion to quash the indictment. This motion being sustained, the circuit attorney excepted, and brings the case here by appeal. The indictment charges that John Williamson, on, &c., at, &c., did sell to one Martin Norris, intoxicating liquor, to wit, one quart of whisky, to be drank at the place of sale, in the county aforesaid, and that he received pay for the same from the said Norris, to-wit, twenty cents, on the day and year aforesaid; and that he, the said John Williamson, did, then and there, permit and suffer the same to be drank at the place of sale, without having any license for that purpose continuing in force, &c.

1. This indictment is substantially good. No person is authorized to sell intoxicating liquor in quantities less than a quart, to be drank at the place of sale, without a license. Under the 20th section of the act concerning groceries and dram shops, (R. C. 1845,) intoxicating liquor may be sold in any quantity not less than a quart, at the place where made; but the maker or seller shall not suffer or permit the same to be drank at the place of sale, nor at any place under his control. Under the provisions of this same act, any person might sell spirituous liquors in quantities not less than a quart, at the distance of one mile from any town or village, but not to be drank at the place where sold. Merchants, under their license as such, could sell quantities not less than a quart; but could sell no quantity to be drank at the store or place of business.

The charge here is, selling one quart of whisky, to be drank at the place of sale, and suffering and permitting it to be drank at the place of sale. The offence is not in the quantity sold alone, but it consists in selling and permitting the liquor thus

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sold to be drank at the place of sale, without a license. The want of license is averred generally. Upon the whole view of the law upon this subject, this court is of opinion, that the indictment is well enough, and that the motion to quash it should have been overruled.

The judgment of the Circuit Court is therefore reversed, and this cause is remanded for further proceedings; the other judges concurring.

THE STATE, Respondent, *vs.* ENGLAND, Appellant.

1. An indictment commenced thus: "State of Missouri, county of Hickory. The grand jurors for the state of ———, empaneled, charged and sworn," &c. *Held*, sufficient.

Appeal from Hickory Circuit Court.

F. P. Wright, for appellant. 1. The indictment does not run in the name of the state of Missouri, as required by the constitution. 2. It is submitted that a new trial should have been granted on account of the failure of proof.

Gardenhire, (attorney general,) for the State.

RYLAND, Judge, delivered the opinion of the court.

The grand jury, at the September term, in the year eighteen hundred and fifty-two, of the Circuit Court, within and for the county of Hickory, indicted Joseph England, with some three others, for gaming.

At the September term, 1853, the defendant, England, and two of the others, appeared in court, and filed their motion to quash the indictment, which motion is as follows: "The said defendants come and move the court to quash the indictment, because the same is insufficient in law, because it does not state that the grand jurors were of the state of Missouri, and for other reasons."

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The court overruled this motion, and the defendants then plead not guilty; a jury was empaneled, which found the defendants guilty, and assessed their punishment at a fine of ten dollars each.

The defendants afterwards moved for a new trial, which was refused them. They then moved in arrest of judgment as follows: "The defendants come and move the court to arrest the judgment in this cause, because the judgment is insufficient in law; because the prosecution is not in the name of the state of Missouri, and for other causes." This motion the court also overruled; the defendant, England, excepted, and filed his bill of exceptions, and brings the case here by appeal.

This court will not notice the motion for a new trial; there was evidence touching the charge against the defendants, and the weight and sufficiency of it, to establish the guilt, was properly left to the jury; their verdict was satisfactory to the court before which the trial was had, and this court will not interfere in such a case.

1. The main question relied on for the reversal of the judgment of the Circuit Court, arises on the indictment itself. The appellant's counsel contends that this prosecution is not carried on in the name of the state, as is required by our state constitution. It becomes this court, therefore, to examine this indictment carefully. The indictment is as follows, to-wit:

"State of Missouri, } In the Hickory Circuit Court—Sep-
"County of Hickory, } tember term, A. D. 1852.

"The grand jurors for the state of ———, empaneled, charged and sworn to inquire within and for the body of the county of Hickory aforesaid, upon their oath present, that Joseph England, David Low, Young J. Skinner and John H. Brannon, late of the county of Hickory aforesaid," &c., (charging the offence properly,) and then concludes thus: "contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state."

The defect complained of consists in omitting to insert the

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word "*Missouri*" after the words "state of," in the commencement of the indictment.

All writs and process shall run, and all prosecutions shall be conducted in the name of the "State of Missouri." All writs shall be tested by the clerk of the court from which they shall be issued; and all indictments shall conclude "against the peace and dignity of the state." State constitution, art. 5, section 19.

Here the indictment begins, by stating in the margin thus: "State of Missouri, county of Hickory. The grand jurors for the state of ———, empaneled, charged and sworn to inquire within and for the body of the county of Hickory aforesaid," &c. Now suppose the word "of" had been omitted, could it be doubted that the prosecution was in the name of the state? Here, the first words of the indictment are, "State of Missouri, county of Hickory;" and the grand jurors are empaneled, charged and sworn to inquire within and for the body of the county aforesaid; that is, the body of Hickory county, in the state of Missouri. The grand jurors of the "state." What state? Missouri, beyond a doubt. Then the word "of" cannot change or affect the meaning and certainty of the previous words. Let the word "of" stand, it will and can do no harm; it is merely useless and nonsensical: reject it, and it is plain to be seen that the whole proceeding is in and for the state of Missouri.

The record shows that, at a circuit court of the seventh judicial circuit of the state of Missouri, begun and held at the court house, in the town of Hermitage, in the county of Hickory, within and for said county of Hickory, on Monday, the 27th day of September, 1852, when and where the sheriff of Hickory county returned into court his *venire facias* for a grand jury, the grand jury were empaneled and charged, and returned into court the following indictment; then comes the indictment in this case.

I know there is much said in the old books about grand ju-

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rors being sworn, charged and empaneled, to enquire as well for the king as also for the body of the county. There are forms both ways on this subject, and the English forms generally use the words, "the grand jurors of our lord, the king," &c.; yet I do not consider the omission of the word "Missouri," in the commencement of this indictment, in any way fatal. The indictment is sufficiently good to support the judgment, and the Circuit Court very properly overruled the motion in arrest. Its judgment therefore, with the concurrence of Judge Gamble, is affirmed.

THE STATE, Respondent, *vs.* WILLIAMS, Appellant.

1. Under the amendatory act of 1847, the taker up of a stray steer is not required to take the same before a justice of the peace, as required by the act of 1845, concerning "strays."

Error to Polk Circuit Court.

P. R. Hayden, for plaintiff in error. The indictment does not charge the defendant with any indictable offence. The act of 1845 is repealed by the act of 1847, so far as relates to the matter charged in the indictment.

Gardenhire, (attorney general,) for the state.

RYLAND, Judge, delivered the opinion of the court.

At the April term of the Circuit Court within and for the county of Polk, in the year of our Lord eighteen hundred and fifty-three, the defendant, William Williams, was indicted by the grand jury. The indictment charges that the defendant, at, &c., on, &c., did then and there take up a stray, to-wit, one stray steer, which was not then and there claimed and proved within five days from the day of taking up the same; and that

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said defendant did not, within five days from the day of taking up said stray, take the said steer before a justice of the peace, &c., and make oath that said steer was taken up on his plantation, and that the marks and brands had not been since altered to his knowledge, but sold the same, contrary, &c. The defendant was tried on this indictment and found guilty, and fined twenty dollars. He moved in arrest of judgment, alleging the insufficiency of the indictment; this motion being overruled, he excepted, and sued out his writ of error, and brings the case to this court.

1. The indictment in this case is framed on the fourth section of the act concerning "strays," (R. C. 1845, p. 1039,) which is in these words: "If any person take up any stray of any kind, and it be not claimed and proved, he shall, within five days, take it before a justice of the peace of the county, and make oath that it was taken up on his plantation, and that the marks and brands have not been since altered, to his knowledge."

This fourth section of the act concerning strays, in the Revised Code of 1845, was changed by the act of 1847, amendatory of the stray law of 1845. This last act, that is, the act of 1847, is as follows: Section 1. "That so much of the fourth section of the act concerning strays, of 1845, as requires a taker up to take strays before a justice of the peace, shall not be so construed as to compel the taker up to take any hogs, cattle, sheep, goat or other unbroke animal, before a justice of the peace." Section 2. "But the taker up may get two disinterested householders to view and appraise the stray or strays, who shall go before some justice of the peace and take an oath, as required by the sixth section of the act of 1845." The third section repeals all conflicting acts or parts of acts.

The stray mentioned in this indictment is a steer; it is such an animal as is included in this amendatory act—such an animal as the taker up is not required to take before a justice of the peace. The indictment, then, charges the defendant with

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the omission to do an act which is not required by law to be done; the failure, therefore, is no offence.

In the opinion of this court, the sale of the stray, to be punishable under the 29th section of the act of 1845, must be alleged to be before the title was vested in the taker up. The indictment, therefore, in this case, shows no offence; it will not support the conviction. The judgment below ought to have been arrested.

The judgment of the Circuit Court is, with the concurrence of the other judges, reversed.

— • • • —

THE STATE, Respondent, *vs.* LARRIMORE, Appellant.

1. A physician, who administers intoxicating liquor in good faith as a medicine, upon his professional judgment, is not within the meaning of the first section of the act concerning groceries and dram shops. (R. C. 1845.)

Appeal from Polk Circuit Court.

F. P. Wright, for appellant. Physicians, who sell liquor as a medicine, are not within the meaning of the act. The *intention* of the legislature is to prevail even against the letter of the act. The sale of liquors, as a *medicine*, is not the mischief which the statute was designed to remedy.

Gardenhire, (attorney general,) for the state. The act does not exempt physicians.

GAMBLE, Judge, delivered the opinion of the court.

The defendant was indicted for selling a half pint of brandy without license. The defence was, that he was a practising physician, and as such, sold a small quantity of brandy as a medicine. The Court instructed the jury "that, if they believed from the evidence, that the defendant sold any quantity

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of intoxicating liquor less than a quart, as charged in the indictment, within the county of Polk, and within one year before the finding of the indictment, they should find him guilty, and it is no excuse that the defendant was a physician, and sold the liquor, after much importunity, as a medicine."

1. If this instruction had left the question to the jury, whether the defendant had, in good faith, sold the brandy to a sick person as a medicine, and he had then been convicted, we would not have disturbed the judgment. Physicians are not to become dramshop keepers, under color of their professional practice. If a physician, upon his professional judgment that a sick person needs brandy, administers it as a medicine, in good faith, and charges for it, he is not to be punished; because such liquor, properly used, is a valuable medicine. But if he sells it to a man who is well, or sells it to a man who is not well, without exercising his professional judgment, and determining that it is necessary for the sick person, he is indictable. His exemption from the fine is not to rest upon the strong wish of the individual purchasing to have the liquor, nor merely upon the judgment of such person that the liquor would be useful to him as a medicine, but must be founded upon the judgment of the physician that it is a medicine which the diseased man requires.

In the present case, the instruction given to the jury makes the defendant liable for selling the glass of brandy, and declares that his being a physician, and having sold it as a medicine, does not excuse him. Now the question which they should have been required to decide was, whether he really administered the liquor to a diseased person, as a medicine, upon his professional judgment of its necessity. As given, the instruction might have made the defendant liable in a case in which he should not have been fined.

The judgment is, with the concurrence of the other judges, reversed, and the cause remanded.

THE STATE, Appellant, *vs.* NELSON, Respondent.

1. An indictment which charges the defendant with permitting a "gambling device" instead of a "gaming device" is sufficient.

Gardenhire, (attorney general,) for the State. The indictment is not bad in using the word "gambling" instead of "gaming." Those words are used synonymously in the statute. *State v. Mitchell*, 6 Mo. Rep. 147.

F. P. Wright, for respondent. 1. The indictment should follow the words of the statute. 2. It is bad for duplicity.

RYLAND, Judge, delivered the opinion of the court.

At the April term of the Circuit Court of Daviess county, in the year eighteen hundred and fifty-three, the grand jury indicted the defendant, Joseph L. Nelson, and one William Johnson, for permitting gaming to be carried on in a house in their possession. The defendant, Nelson, was taken by the sheriff, and the *capias* returned "not executed on Johnson."

At the October term following, the defendant, Nelson, filed his motion to quash the indictment, which motion is as follows: "The defendant, Joseph L. Nelson, moves the court to quash the indictment in this case, because the same is not in the words of the statute; because the indictment charges no offence known to the law.

The indictment charges that defendants permitted a certain gambling device to be used for the purpose of *gambling*, &c., when the statute only prohibits the use of such device for the purpose of *gaming*; and because the indictment is, in other respects, informal and insufficient."

The court sustained this motion, and the circuit attorney excepted, and brings the case here by appeal. The indictment is as follows:

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“ State of Missouri, }
“ Fifth Judicial Circuit. }

“ In the Circuit Court of the county of Daviess, in the state of Missouri, of April term, A. D. 1853.

“ Daviess county, to-wit :

“ The grand jurors for the state of Missouri, for the body of the county of Daviess aforesaid, upon their oath present, that Joseph L. Nelson and William Johnson, both late of the county of Daviess aforesaid, on the fourth day of April, in the year of our Lord, one thousand eight hundred and fifty-three, with force and arms, at the county of Daviess aforesaid, unlawfully did suffer and permit a gambling device, called cards, which said gambling device was then and there adapted, devised and designed for the purpose of playing games of chance for money or property, to be used for the purpose of gambling, in a house of which they, the said Joseph L. Nelson and William Johnson then and there had the possession and control, by divers persons then and there in the house aforesaid, in the possession and under the control aforesaid then and there being; and did then and there, in the house aforesaid, in the possession and under the control aforesaid, unlawfully suffer and permit the said persons to play divers games of chance with said gambling device, for money and property; upon which said games of chance, so played as aforesaid, money and property was then and there bet, won and lost, against the form of the statute in such case made and provided, and against the peace and dignity of the state.”

1. The question before us involves the sufficiency of this indictment. For the appellee, the defendant below, it is insisted that the indictment was properly quashed, because the offence being created by statute, it ought to be charged in the words of the statute, and not in words of the same import.

The indictment, it will be seen, charges that the defendant, unlawfully, did suffer and permit a gambling device, called cards, which said gambling device was then and there adapted,

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devised and designed for the purpose of playing games of chance for money or property, to be used for *the purpose of gambling* in a house, &c., and did then and there, in the house aforesaid, &c., unlawfully suffer and permit the said persons to play divers games of chance with said gambling device, for money *and* property, upon which said games of chance, &c., money and property was then and there bet, won and lost, against the form, &c.

The statute prohibits any such gambling device to be set up or used for the purpose of *gaming*: here the averment is for the purpose of *gambling*.

In looking into the statute on this subject, it will be seen that the legislature used the words gambling and gaming as synonymous terms.

In the fifteenth section of the eighth article of the act concerning crimes and punishments, (R. C. 1845, p. 401 and 402,) we find the words, "or any kind of *gambling table* or gambling device adapted," &c.; then it prohibits any person from playing at or upon any such *gaming table* or gambling device—promiscuously using the words *gambling table* and *gaming table*. Then gambling table or gaming table is a sufficient descriptive allegation under this statute, and the averment "to be used for the purpose of gambling, is sufficient, and is considered as good as if it had been for the purpose of gaming, both terms being used synonymously in the statute."

The indictment does not charge that *money or property* was bet, won and lost, but that money *and* property. The statute uses these words in the disjunctive, when it is describing the gaming table or gambling device adapted, devised and designed for the purpose of playing any game of chance for money or property; and in describing the gambling table, the circuit attorney averred it to be adapted, devised and designed for playing games of chance for money *or* property. This was proper enough; it would have been good either way, conjunctively or disjunctively.

There is nothing in the objection, that the indictment is dou-

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ble, charging the use of the gambling device, and averring the permission for divers persons to play at and upon it for money and property, and that divers persons did play and bet money and property on said gambling device. In indictments for these minor offences, it is not meet for the court to lend a willing ear to objections on such trifling imperfections. See cases of *Storrs v. State*, 3 Mo. Rep. 9. *State v. Ellis*, 4 Mo. Rep. 474.

In the opinion of this court, the indictment is sufficient, and the motion to quash it should not have been sustained by the Circuit Court; its judgment is, therefore, with the concurrence of the other judges, reversed, and this cause is remanded.

END OF JANUARY TERM.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF MISSOURI,
MARCH TERM, 1854, AT ST. LOUIS.

ROACH, Plaintiff in Error, *vs.* SETTLES & HUNTER, Defendants in Error.

1. The summary proceeding against a constable and his securities, under the 23d and subsequent sections of the 7th article of the act concerning justices' courts. (R. C. 1845,) must be before the justice who issued the execution, in respect to which the delinquency arose, or before his successor in office.

Error to Marion Circuit Court.

Proceeding against a constable and his securities for a failure to levy an execution and for a false return of the same. The execution was issued by Justice Lizenby, who afterwards died, and was succeeded in office by Wesley Lair. This proceeding was begun before Justice Roberts, who gave judgment against the constable and his securities for the amount of the execution and the statutory penalty. The constable appealed to the Circuit Court, where the suit was dismissed. The plaintiff appeals to this court.

T. Van Swearingen, for plaintiff in error.

W. M. Cooke, for defendants in error.

RYLAND, Judge, delivered the opinion of the court.

1. This is a proceeding under the 23d, 24th, 25th, 26th and 27th sections of the 7th article of the act concerning "Justices' Courts," (R. C. 1845, p. 665, 666.) This proceeding is a summary one, and must be regulated by, and be in conformity with the provisions of the statute. It is not like a common law action on the official bond of the constable, but it is a summary mode of reaching the constable and his securities, for neglect of duty, either in failing to make return of the execution according to the command thereof, or in making a false return, or in failing to have the money collected on the execution before the justice on the return day; or in failing to pay over, on demand, any money received in payment of any judgment, or upon any bond, &c., placed in his hands for collection. This proceeding commences by a summons, requiring the parties, that is, constable and securities, to appear at a certain place and time, not exceeding six days from issuing of the summons, and *show cause* why an *execution* shall not issue against him, the constable, or against him and his securities, for the amount due upon the execution, or received or collected, as the case may be. I shall not deem it necessary to name the various steps in this proceeding, as required in the above sections of the act. The party injured may, at his option, resort to another mode of redress. He may sue at common law on the official bond of the constable. If he seeks his redress in the summary mode, as pointed out by the statute, then the proceeding must be before the justice of the peace who gave the judgment and issued the execution originally, on which the constable's improper conduct arose, or before the successor in office of such justice. This summary proceeding cannot be had before another or a different justice. If the first be dead or out of office, then the successor to him is the proper officer before whom this proceeding can be had. Here the act complained of was the failure and neglect of the constable to levy the execution, and the making of a false return of and on the execution.

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The record shows that the execution was issued by Jerry Lizenby, a justice of the peace, and it is admitted that said Lizenby had resigned his office, and that Wesley Lair, another justice, had possession of the docket of said Lizenby. The record shows that Lair was his successor. This proceeding is before William K. Roberts, a justice of the peace in the same township and county.

I pass by the minor points submitted by the parties, and proceed to give our views of the main question. This court is of opinion, that there can be no doubt, from the phraseology of the various sections of the above act, giving the remedy sought to be applied in this case, that such proceeding must be commenced before the justice of the peace, who issued the first execution, or his successor in office; that Roberts, not being that justice, nor the successor of him, had no jurisdiction of the proceedings in this case, and that the court below very properly dismissed the suit. The other judges concurring, the judgment below is affirmed.

BOWEN & BOWEN, Defendants in Error, *vs.* BOWER'S EXECUTORS, Plaintiffs in Error.

1. A trustee cannot recover the trust property from a grantee of his *cestui que trust* while the estate of the latter continues.

Error to Marion Circuit Court.

Pratt & Redd, for plaintiff in error.

Anderson & Richmond, for defendants in error.

GAMBLE, Judge, delivered the opinion of the court.

The plaintiffs claim as trustees, under the will of Mary H. Bowen, of Tennessee. By that will, certain slaves and their increase were bequeathed to the plaintiffs, in trust for her

daughter, Celia W. Stone, "during her natural life, and then to the heirs of her body forever." The negroes, at the time of the death of the testatrix, were in Tennessee, and were subsequently brought to Missouri. The defendants offered to prove that Mrs. Stone gave the slave now sued for to her son-in-law, Bower, whose executors are the defendants, but the court refused to admit the testimony. Mrs. Stone, at the commencement of this suit, was in full life, and swore to the petition of the plaintiffs.

1. Although the record furnishes no evidence of the law of Tennessee in relation to the bequest in the will of Mrs. Bowen, we see that whatever estate passed by it in the trust, for the benefit of Mrs. Stone, could not be less than an estate for her life, and from the offer of the defendants to prove that Mrs. Stone parted with her interest in the slave in controversy to her son-in-law, Bower, we are to assume such to be the fact. We have then, the case of trustees suing for a slave or his value, when the *cestui que trust* for life has transferred her interest in the slave to another, and is still in full life herself; and this suit is brought in a court where the legal and equitable estates are not to be separately regarded. Unquestionably the plaintiffs would not be allowed to recover the slave from their own *cestui que trust*, nor can they recover from her grantee while yet her estate continues. The object of this action is, to put the value of the slave into the hands of the trustees, for the use of Mrs. Stone, contrary to the transfer of her right, alleged by the defendants to have been made to her son-in-law. This cannot be allowed.

The judgment is reversed, and the cause remanded, with the concurrence of the other judges.

HALL, Defendant in Error, vs. SHANNON, Plaintiff in Error.

1. Crops sown by a tenant, and afterwards abandoned by him, and harvested by the landlord after the expiration of the lease, are not liable to attachment as the property of the tenant, whether the latter would have had the right to enter upon the land and gather the crops or not.

Error to Marion Circuit Court.

Lipscomb, for plaintiff in error.

Anderson, for defendant in error.

SCOTT, Judge, delivered the opinion of the court.

Shannon, the plaintiff in error, sued Jeptha L. Wihle, in attachment, which was levied on some wheat in shocks. Hall, the defendant in error, claiming the wheat, interpleaded.

Simpson Mays died possessed of the land which produced the wheat, and his administrator, with the consent of his widow, leased it from year to year. Hall rented the land for a year ending the first of March, 1851; this he continued to do until March, 1853. In the summer of 1851, the widow of Mays intermarried with Wihle, the defendant in the attachment. The administrator continued to manage the land, notwithstanding this marriage. In the autumn of 1851, Hall gave leave to Wihle to sow a part of the land in wheat, which he did. Wihle afterwards parted with his wife, and during the winter following, left the country and has not been since heard of. The permission to sow was given before Hall had renewed his lease for the year 1852. Hall, under his renewed lease, reaped the crop in 1852, which is the subject of this controversy. The plaintiff in the attachment asked the following instructions, which were refused:

1. If the jury believe from the evidence, that Simpson Mays owned the farm upon which the crop of wheat in question was grown, that he died on the same, leaving a widow, to whom no

dower has been assigned in said farm ; that said widow became the wife of Wihle, the defendant in the attachment suit ; that after the marriage, Wihle sowed the wheat, with the consent of Hall, the tenant and plaintiff, and that plaintiff was only tenant for the year ending first of March, 1852, then the said crop was the property of Wihle, and he was entitled to possession of the farm from and after the said first of March, 1852, and they will find for the defendant.

2. If the jury find from the evidence, that Mrs. Wihle was the widow of Simpson Mays, deceased ; that he owned the farm upon which the wheat was grown, and died on said farm ; that since his death, dower in the same has not been assigned his said widow, and that the term for which plaintiff had rented it ended on the first of March, 1852, then she, in her right, as widow of Simpson Mays, deceased, was entitled to the rent of the farm and to possession thereof, upon the termination of plaintiff's tenancy, to-wit, 1st March, 1852, and all his right, in this regard, vested in Wihle, immediately upon the marriage, and they will, therefore, find the wheat to be the property of said Wihle. There was a judgment for Hall, the interpleader.

1. As the administrator of Mays continued the exercise of the power of leasing the land, and as that right was not interrupted by Wihle, in virtue of the quarantine of his wife, as he sowed by the permission of the lessee, all the interest he had in the land, after sowing the wheat, (if he even had that, as the lease under which he acquired permission to sow, expired before harvest time,) was the right to enter and gather the crop. As he abandoned the crop and left the country, the administrator had the right to lease the land, and the crop sown would go along with it, as an incident. Whether the administrator, under the circumstances, would be liable to Wihle for the value of his services, in sowing the crop, and for the seed wheat, it is not necessary now to determine. Shannon had no right to lie by until the wheat was harvested and then seize it. His only claim could be for the seed wheat and for the services of his debtor in putting it in.

Hayden's Ex'rs v. Marmaduke.

There is nothing in the affidavits which discloses any ground for a new trial. The other judges concurring, the judgment will be affirmed.

HAYDEN'S EXECUTORS, Plaintiffs in Error, vs. MARMADUKE
et al., Defendants in Error.

1. Any trustee having reasonable doubt as to the proper disposition of funds in his hands has a right, for his own safety, to apply to a court of equity for directions, making the persons interested parties to the proceeding.
2. Under the code, it is improper to dismiss a suit because all are not made parties who should have been, the court having power to order others interested to be made parties.

Error to Marion Circuit Court.

Anderson and Lipscomb, for plaintiffs in error.

P. R. Hayden, Pratt & Redd, for defendants in error.

GAMBLE, Judge, delivered the opinion of the court.

In this case, executors who have in their hands a fund claimed by different persons, come into court asking the direction of the court as to the disposition to be made of it, in order that they may be protected by the decree of the court. The fund itself has been produced by means not in the contemplation of the testator. The court, on its motion, dismissed the case upon the hearing, without any cause appearing for such proceeding.

1. If the reason for such dismissal was the want of jurisdiction, the reason was fallacious. Any trustee placed in circumstances in which he may have reasonable doubt as to the proper disposition of the funds in his hands, has a right, for his own safety, to apply to a court of equity for directions, making the persons interested parties to the proceeding. *Talbot v. Earl of Radnor*, 3 Mylne & Keen, 252. *Curtis v. Candler*, 6 Mad. 123. *Lewin on Trusts*, 318.

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2. If the case was dismissed because the Circuit Court thought there were not all the parties in the suit who should have been brought in, this was improper, because, under section 10, article 3 of the code, the court had the power to order that any other persons necessary to be made parties, in order to a complete determination of the controversy, should be made parties.

The judgment of the Circuit Court is reversed, and the cause remanded, to be proceeded with.

GILLET, Appellant, vs. CAMP, Respondent.

1. The distributive share of a wife in an estate, not reduced into possession during the marriage, does not belong to the husband after her death. *Leakey's Adm'r v. Maupin*, 10 Mo. Rep. 372, affirmed.
2. The personal estate of an intestate does not upon his death descend immediately to those entitled to distribution, but where there is administration on the estate, the right to the possession is in the administrator.

Appeal from Warren Circuit Court.

G. Porter and B. R. Pitts, for appellant.

A. H. Buckner, for respondent.

GAMBLE, Judge, delivered the opinion of the court.

Gillet, in his petition, asks for partition of certain slaves in the hands of the administrator of Debo, claiming that he, as the husband of Debo's widow, is entitled to one half, and that Mrs. Camp, who is the daughter of Debo, is entitled to the other half. He alleges that his wife, after the death of her first husband, Debo, paid all the debts of the estate, and kept in her hands, without administration, the female slave who is the mother of the other slaves named in the petition, and that the plaintiff, after his intermarriage with Mrs. Debo, continued in the possession of the slaves for some thirteen years, when

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administration was granted on Debo's estate and the slaves were recovered from the plaintiff by the administrator. The plaintiff's wife is dead. The petition further alleges that the slaves now in the hands of the administrator are not required for the payment of debts. There was a demurrer to the petition which was sustained.

We cannot, in this proceeding, correct any supposed error in the suit between Debo's administrator and the plaintiff, in which the slaves were recovered from the plaintiff. We must take the judgment to have correctly settled the rights of the parties. The case then, is one in which a husband is asking for partition of slaves, the petitioner claiming in right of a deceased wife; the slaves being in the hands of an administrator, in course of administration. Since the recovery of the slaves from the plaintiff, by the administrator of Debo, they have continued in possession of the administrator, and that is, upon the case presented, to be assumed to be a rightful possession.

In *Leakey's Adm'r v. Maupin*, 10 Mo. Rep. 369, it was held, that the distributive share of a wife, not reduced into possession during the marriage, did not belong to the husband after her death. It was also held that the personal estate of an intestate did not, upon his death, descend immediately to those entitled to distribution, but where there is administration on the estate, the right to the possession is in the administrator. Assuming the slaves to be now rightfully in the hands of Debo's administrator, the case is one in which the courts are asked to divide those slaves by a proceeding in partition between the present plaintiff, whose wife is dead, and the daughter of Debo. In other words, the plaintiff claims his wife's distributive share or dower in Debo's slaves. This, upon authority, cannot be allowed. What might have been the merits of the plaintiff's case, if he had used the facts stated in his present petition, as a ground of defence against the suit of Debo's administrator, we are not called upon to say; but in the

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present case, in which he is asking for partition of slaves in the hands of Debo's administrator, he cannot succeed. The judgment is affirmed, with the concurrence of the other judges.

HOLLINSWORTH, Appellant, vs. MATTHEWS *et al.*, Respondents.

1. The securities in a *rejected* bond for costs are discharged, upon the dismissal of the suit for the plaintiff's failure to file an approved bond.

Appeal from Washington Circuit Court.

M. Frissell, for appellant.

C. Jones, for respondent.

RYLAND, Judge, delivered the opinion of the court.

The plaintiff brought this suit in the Circuit Court of Washington county, against the defendants, for damages for a yoke of oxen. After the institution of the suit, the defendants filed their motion requiring plaintiff to give security for costs of the suit. This motion was sustained, and an order requiring the plaintiff to file his bond with security for costs of suit was made by the court. The plaintiff thereupon filed his bond with William A. Montry, Wm. T. Wilson, Peter Curtis and Philip Richard, securities. This bond and these securities were considered insufficient, and not being approved by the court, the plaintiff failing to give any other, the suit was dismissed at the plaintiff's costs. The judgment for costs was entered up against plaintiff and the above persons, who united in the bond for costs, which had been rejected. The clerk issued the execution now before the court, on this judgment, against Hollinsworth alone. Hollinsworth moved to quash this execution, because it did not correspond with the judgment, alleging that it had no judgment to support it. The judgment was against

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Hollinsworth and four others, and the execution appeared as issuing upon a judgment against Hollinsworth alone. The court overruled this motion to quash, and the defendant in the execution appeals to this court.

1. This court is of the opinion that the Circuit Court very properly overruled the motion to quash. The judgment against the securities in a bond for costs which had been disapproved and rejected by the court, must be considered as invalid, and was properly disregarded by the court below. The party below objects to the securities in the bond; his objection prevails; a new bond is required, the first being considered as worthless; this new bond is not produced; the suit is dismissed for want of a bond. To give judgment and issue execution against the securities in the rejected bond is, at least, an anomaly. This court holds such judgment as of no validity, of no binding force; the bond never having been received and approved, is no bond, for the purpose of this suit, and gives no authority or right to the court to enter judgment thereon. The judgment, therefore, against all but Hollinsworth, is considered as no judgment—gives no authority to the clerk to issue execution thereon.

In the case of *Ward v. Lyne et al.*, 4 Comstock, 171, it was considered by the court of appeals of New York that, where the sureties in a bond given on a writ of error were excepted to and failed to justify, in consequence of which the writ of error was suspended, that the sureties were thereby discharged; and this was a good defence to an execution on the bond.

The old rule was, that special bail, when sued, could not defend on the ground that there had been an execution and failure to justify. The remedy was, by motion, to have their names struck out of the bail piece, or that an exoneration be entered. 4 Burr. 2107. 1 Taunt. 427. 7 East. 580. 1 W. Black. 462. The court of errors of New York decided that the sureties in an error bond, after execution and failure to justify, were discharged. See the case of *Drummond & Watson v.*

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Anderson, court of errors, December sitting, 1844. Applying the principle of this case from New York, which we think just and reasonable, and these persons, in this rejected bond, were not under any obligation, the moment the court refused to receive and approve the bond. They were then discharged. Consequently, the judgment against them is invalid, and the motion to quash in this case, properly overruled. The other judges concurring, the judgment will be affirmed.

MILES, Plaintiff in Error, vs. DAVIS & TAYLOR, Defendants
in Error.

1. The refusal of a court to give an instruction asked by a party is not equivalent to the assertion of the converse proposition of law.
2. Where property was conveyed to A., with a clause of defeasance if the grantor should, within five years, pay a debt due from him to B., and A., treating the conveyance as a mortgage, obtained judgment of foreclosure upon the *cognovit* of the grantor in a suit to which B. was not a party, it was held that the title of the purchaser at a sale under the judgment could not be disputed in a collateral proceeding.
3. Where persons are made trustees for the payment of debts or legacies, the rights of the creditors or legatees will be bound by a judgment fairly obtained in a proceeding in which the trustees are parties, although the creditors or legatees are not before the court.
4. An officer executing process may amend his return by leave of court, after the expiration of his official term.¹

Error to Lewis Circuit Court.

This was an action of ejectment begun in Marion county, and taken by change of venue to the Circuit Court of Lewis county. Both parties claimed title under Ezra S. Ely, as follows :

On the 5th of January, 1838, Ezra S. Ely, of Philadelphia, being largely indebted to his wards, Mary Ann Carswell (the wife of plaintiff) and the children of one Brady, conveyed the property in controversy, together with other real and personal property, to Margaret Carswell and Samuel McClellan. This

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deed recited the indebtedness of the grantor to his wards, described the property conveyed, and then stated that the conveyance was subject to the condition that, if the grantor or his legal representatives should, within five years, pay the debts due to his wards, then the deed to be void.

On the 23d of August, 1843, Margaret Carswell and McClellan, treating the conveyance to them as a mortgage, instituted a proceeding to foreclose the same. Ely confessed the petition, judgment was entered, a special *fiery facias* issued against the mortgaged property, and the same was sold by the sheriff. At the sale, Carswell and McClellan became the purchasers of much of the property. The land in dispute was bought by Glover & Wells. The original return upon the execution failed to show the purchase by Wells & Glover, and on the 15th of March, 1848, after the expiration of his term of office, the sheriff was allowed to amend his return, so as to show the sale to them at the price of \$12. On the 2d of August, 1848, the sheriff who made the sale executed a deed to Glover & Wells. Wells afterwards conveyed to Glover, who conveyed to the defendant, Taylor. This was one branch of the defendants' title.

Another branch was as follows: On the 28th of May, 1844, Ely addressed a letter to the sheriff of Marion county, requesting him, in consideration of the sum bid by Glover & Wells at the sale, receipt of which was acknowledged, "as well as for divers other good considerations," to make a deed to them. This letter concluded in the form of a quit claim deed to Glover & Wells of all the right and title of Ely and of Carswell & McClellan to the land in dispute. It was signed and sealed by Ely for himself, and as attorney in fact of Carswell & McClellan. Powers of attorney from Carswell & McClellan to Ely were read in evidence, but there was a question whether their terms were broad enough to authorize Ely to convey the property held by C. & M. in trust.

The plaintiff's title was as follows: On the 27th of March, 1850, Margaret Carswell and Samuel McClellan, pursuant to

a decree of the Philadelphia Court of Common Pleas, conveyed to the plaintiff, in trust for the trustees of his wife, all the right, title and interest in the land in dispute vested in them by the conveyance of January 5, 1838, which they styled a mortgage, together with all their title to the property purchased by them at the sheriff's sale under the foreclosure.

On behalf of the defendants, it was proved that Glover & Wells contracted with Ely for the purchase of the land in controversy at the price of \$3000, which was paid by them. This was before the letter of Ely to the sheriff.

Some evidence was offered by the defendants, with a view to show that the conveyance of January 5, 1838, was made by Ely to hinder, delay and defraud his creditors; and aside from any evidence, the defendants claimed that this deed was fraudulent and void upon its face. If it was not fraudulent, then they claimed that they had a good title under the judgment of foreclosure, the sale and the sheriff's deed.

At the close of the evidence, the plaintiff asked six instructions, all of which, except two, bearing upon the question of fraud, were refused. The sixth instruction refused asserted that the judgment of foreclosure, and the sale and sheriff's deed under it, passed no title. The plaintiff submitted to a nonsuit, and sued out a writ of error. The cause was submitted on briefs.

Pratt & Redd, (with whom *R. M. Field* was associated as counsel,) after arguing the question of fraud, insisted that the judgment and proceedings in the foreclosure suit, under which defendants claim title, were void, because the court had no jurisdiction. The act of 1835 gives to a court of law jurisdiction to foreclose a mortgage, but gives no jurisdiction over trusts. The deed of January 5, 1838, was a deed of trust and not a mortgage. *Lewin on Trusts*, (22 Law Lib. p. 9, 12, 87.) 1 *Madd. Ch.* 445, 451. *Powell on Mort.* p. 4. 1 *Black. Comm.* 126. 3 *Bacon's Ab. tit. "Mortgage,"* A. p. 612. 1 *Cruise on Real Property*, tit. "Mortgage," p. 78. 1 and 2 *Cruise's Dig. tit. "Mortgage."* This deed can-

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not be a mortgage, because the intent of the grantor is clear that persons other than the grantees shall receive the whole benefit of the grant. The interests of the grantor and grantee in a deed of trust, are different from the interests of the mortgagor and mortgagee. 1 Atk. 604-5. 1 Vernon, 3, 412. Lewin on Trusts, (22 Law Lib. 87.) 4 Kent's Comm. 311, note A. A deed of trust differs from a mortgage also, in respect to the remedies given to the creditor. A judgment in a statutory proceeding for foreclosure of a mortgage is of a threefold character: 1st, for the amount of the debt; 2d, for the sale of the mortgaged property, and 3d, an award of a general execution to satisfy the balance remaining unpaid, after the sale of the mortgaged property. Carswell & McClellan could not get judgment for the mortgage debt, because nothing was owing to them, nor could they get an award of execution to satisfy the debt. The clause of defeasance in the deed does not make it a mortgage, because the legal effect of the deed would have been the same without that clause.

Glover & Richardson, for defendants in error, among other points, argued the following: 1. The proceedings in the suit for foreclosure, with the sheriff's deed, under which defendants claim, constitute a good title as against Carswell & McClellan, and the plaintiff claiming under them. The fact that the sheriff failed to make a return of the sale is not a valid objection to the title of the defendants in a collateral proceeding. The deed passed the title and no return was necessary. 6 Harr. & John. 205. 7 Blackf. 156-7. 2. Caines, 63. 2 Alabama, 682. 4 Wheaton, 504. 4 Dev. & Batt. 422. 8 Mo. Rep. 185-6-7. 3 J. J. Marsh. 439. But the sheriff was properly allowed to amend his return. 2 Eng. Rep. 344. 1 Cowen, 430. 3 Monroe, 295. 10 N. H. 291. 3 Murphy, 128. 14 Maine, 263. 16 ib. 124. 1 Cowen, 218.

GAMBLE, Judge, delivered the opinion of the court.

The instrument executed by Ely, in January, 1838, conveyed the property to Carswell & McClellan, in trust to secure

the payment of debts admitted to be due to his wards, Mary Ann Carswell and the children of Brady. No power or direction is given in the deed to the trustees, in the event of the failure of Ely to pay the debts at the time specified in the deed. A condition is annexed to the conveyance that, if the money is paid to the wards within five years from its date, the conveyance shall be void. This instrument was treated by the parties and proceeded upon as a mortgage. A petition was filed by Carswell & McClellan for its foreclosure, as in the case of an ordinary mortgage, and to this petition Ely appeared and filed a *cognovit*. Judgment was entered and a special *fieri facias* was issued, upon which the property in question was sold to Glover & Wells, under whom defendants claim. At the same sale, Carswell & McClellan purchased most of the property which was sold.

The present plaintiff claims by a subsequent conveyance made by Carswell & McClellan, under a decree of the Court of Common Pleas of Philadelphia, by which they convey to the plaintiff all their right and title under the deed from Ely to them, styling it a mortgage deed, and also all their right acquired by the deed of the sheriff to the property which they purchased under the judgment and special *fieri facias* before mentioned.

After the purchase at the sheriff's sale, under which the defendant claims the property in question in this suit, it not appearing by the sheriff's return on the execution that he had sold the property at the sale, he was permitted to amend the return so as to state that he had sold it to Glover & Wells, and the price for which it was sold. This was done upon a motion to the court and an order made thereon. A deed was made by the sheriff to Glover & Wells for the property in question, after the expiration of his term of office. He was not in office at the time he was allowed by the court to amend his return.

1. The law reaching the merits of the controversy between these parties has not been declared by the Circuit Court, as the record shows that the plaintiff having asked for certain instruc-

tions to the jury, the court refused some four of those asked, and he immediately took a nonsuit, without any instructions being given to the jury expressing the views of the court upon the law of the case. We have not before us the views of that court applying the law to the facts, and we cannot suppose that this has arisen from any unwillingness to declare such views, but infer that it resulted from the haste of the party in taking a nonsuit, because he could not have the law declared in his own words. We have not heretofore held that the refusal of an instruction was equivalent to the assertion of the converse of the proposition contained in it, and we have seen very many cases, in which such an interpretation of instructions refused would involve the circuit courts in the greatest absurdities. A court may well refuse to give an instruction which contains a correct proposition of law, because either there is no evidence to warrant its being given, or it has already been given in other instructions, or, because the proposition is too abstract to be useful to the jury.

2. Without any analysis of the instructions given and refused, as moved by the plaintiff, we proceed to give our views upon one branch of the title set up by the defendants. They claim under a sale made by the sheriff under the judgment in favor of Carswell & McClellan against Ely, upon the foreclosure of the mortgage. It has been objected to the proceeding which resulted in this sale, that the court has no jurisdiction to give a judgment of foreclosure of an instrument such as that executed by Ely to Carswell & McClellan. It may be admitted that the instrument conveying the property to Carswell & McClellan, in trust to secure an indebtedness to other persons, is not in form an ordinary mortgage, and it may be admitted that, if Ely had resisted the action of the plaintiffs in seeking a foreclosure by the statutory proceeding, it would have been erroneous in the Circuit Court to have given to the plaintiffs in that suit the judgment that was given. But the Circuit Court had jurisdiction of the case, and, however erro-

neous its judgment, a title acquired under it will not be affected by the error.

3. If it be objected that the wards, for whose benefit the conveyance was made, were not parties to the suit, it may be replied, in the language of Judge Story, in his treatise on equity pleading, section 150: "It may be laid down as a general rule that, when any persons are made trustees for the payment of debts and legacies, they may sustain a suit, either as plaintiffs or defendants, without bringing before the court the creditors or legatees for whom they are trustees, which, in many cases, would be impossible; and the rights of the creditors and legatees will be bound by the decision of the court, when fairly obtained, against the trustees. In such cases, the trustees, like executors, are supposed to represent the interests of all persons, creditors or legatees." *Kennerly v. Shepley*, 15 Mo. 648. In the instrument upon which the proceeding was had, there is no covenant to pay the wards of Ely, and they are no otherwise parties to the instrument than as it was made for their security. The instrument itself and the proceeding upon it are very loose, but there is no ground upon which the judgment rendered by the court can be treated in this collateral action as a nullity, either as to the parties to the proceeding or as to the wards of Ely.

4. In like manner, the amendment of the return upon the execution, made by the sheriff who executed the process, upon leave for that purpose granted by the court, although made after his term of office expired, is to be treated in this action as valid. In *Blaisdell v. Steamboat Wm. Pope*, antè, 157, this court held, that an officer executing process might amend his return by leave of the court, after the expiration of his official term.

The only instruction asked by the plaintiff, in relation to this branch of the defendants' title, was the sixth, which required the court to say that no title passed by the proceedings in the suit of *Carswell & McClellan* against Ely and the deed of the

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sheriff. So far as any objections have been urged, either to the jurisdiction of the court or the right to make the amendment as affecting the defendants' title, there is nothing which, in the view of the court, can render it invalid, and as, in all probability, this will be sufficient to end the litigation between the parties, we will not spend further time upon the questions of fraud raised in the other instructions of the plaintiff. The judgment is, with the concurrence of the other judges, affirmed.

 GREGORY *et al.*, Respondents, *vs.* COWGILL *et al.*, Appellants.

1. A case in which the declarations of a testator were held inadmissible to explain the meaning of his will.
2. Where a life estate is expressly given by a will, the same will not be converted into a fee by mere words of implication, unless the manifest general intent of the testator requires it.

Appeal from Lewis Circuit Court.

Anderson and Dryden, for appellants.

Glover & Richardson, Pratt & Redd, for respondents, argued the following points: 1. The words "all that may remain," &c., in the will do not raise a power of disposition in the widow of the testator. *Ide v. Ide*, 5 Mass. 503. 16 J. R. 585. 4 Kent, 319. 2. If those words did raise a power of disposition, there is no evidence that the widow intended to execute the power by her conveyance to the defendant. Where there is an interest and a power in the same person, a deed executed without particular reference to the power, will be applied to the interest. 4 Kent, 334-5. 4 Vesey, 631. 1 Atkyns, 559. 3 Story's Rep. 427. 3 J. C. R. 551. 12 Modern, 470. 2. Parol evidence, to show the intent of the testator, was inadmissible, under the circumstances.

SCOTT, Judge, delivered the opinion of the court.

Robert Sinclair died seized of a considerable estate, both real and personal. By his will, he devised to his wife, Susan,

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all of his estate, both real and personal, of what kind and nature soever, to have and to hold and to enjoy during her natural life-time, with the exception of Eden, his black man, whom, for his fidelity, he emancipated. To his nephew, J. H. Gregory, he devised all that might remain of his estate, both real and personal, after the death of his wife, to have and to hold and to enjoy forever. These clauses, with the exception of the formal parts, constituted the entire will. J. H. Gregory afterwards died, and left the plaintiff, Sarah C. Gregory, his sole heir at law. Susan Sinclair, after the death of her husband, intermarried with William Pritchard, and they joined in a deed conveying the tract of land in controversy, to James Cowgill, the defendant, for the sum of \$1200. This land was one of the tracts devised by the will to Susan Sinclair, the wife of the testator. After the death of Susan Pritchard, (formerly Sinclair,) this suit was brought by the plaintiff, the heir of the devisee in remainder, J. H. Gregory, to recover possession of the land sold to James Cowgill, on the ground that the will of Robert Sinclair gave his wife only a life estate in the land conveyed by her and her husband to Cowgill, and consequently that his interest therein had ceased. The court rejected evidence of the declarations of Robert Sinclair, the testator, showing that, by his will, he intended to give his wife a power of disposal over his entire estate, both real and personal, and instructed the jury that the will only conveyed an estate during her life to Susan Sinclair in the land conveyed to Cowgill, the defendant, without any power of disposal. These opinions of the court were excepted to. There was a judgment for the plaintiff.

1. On no principle, were the declarations of the testator admissible to explain the meaning of his will. None of the circumstances were present, which influence courts to admit parol evidence to give effect to a bequest or devise.

2. An express estate for life was given to Susan Sinclair. If the word "remain" was even sufficient to raise a power of disposition in the devisee for life, there were words in the will

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enough to give it an effect, without applying it to the real estate. Some of the property was of a perishable nature, and some of it would be consumed in the use; it was not, therefore, designed, that such portions of it should be accounted for to the remainder man. The general rule is, that a devise of an estate generally or indefinitely, with a power of disposition over it, carries a fee. But where the estate is given for life only, the devisee takes only an estate for life, though there be a power of disposition in fee by will or deed, unless the obvious general intent of the testator would otherwise be defeated. Words of mere implication will not convert a life estate into a fee, unless the manifest general intent of the testator requires it. *Jackson v. Robins*, 16 John. 588. *Ide v. Ide*, 5 Mass. 203. Here there is no intent of the testator expressed in any way which will overturn this rule.

As there is no cross appeal by the plaintiff, this court cannot affirm the judgment below, and yet enter a judgment for the rents and profits. The trial below was by jury, and if they failed to assess the damages, the plaintiff should have taken the proper steps to have had the error corrected.

The other judges concurring, the judgment is affirmed.

MEEGAN, Defendant in Error, vs. GUNSOLLIS, Plaintiff in Error.

1. A wife residing with her husband upon the property of another cannot, under ordinary circumstances, be joined as a defendant, in an action of ejectment.

Error to Franklin Circuit Court.

Stevenson & Jones, for plaintiff in error.

Frissell, Hudson & Thomas, for defendant in error.

GAMBLE, Judge, delivered the opinion of the court.

The plaintiff commenced his action of ejectment against James Gunsollis and Sophia, his wife, to recover possession of

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land claimed under a deed of trust executed by them. The petition alleges that the plaintiff, on a certain day, was lawfully entitled to the possession of the land, and that the defendants unlawfully withheld from the plaintiff the possession of the premises. The process was served upon both defendants, who demurred to the petition. The demurrer being overruled, an answer was filed in the name of the wife, and, although the action was continued in the name of the husband, even up to trial, no answer was filed in his name, and the court, in finding the facts, found that the husband died since the commencement of the suit. When he died, does not appear. The action seems to have proceeded against the wife after the death of the husband, and resulted in a judgment against her for the possession of the property, damages and monthly value. The court finds "that, at the commencement of this suit, the said James and Sophia were in possession of the land, and that the said Sophia is now in possession, the said James having departed this life since the commencement of this suit." This is the only finding of any participation of the wife in the withholding of the possession from the plaintiff.

The ground of the action is, that the husband and wife having conveyed the land in such manner that the title became vested in the plaintiff, they, after his right accrued, withheld the possession from him. No act is alleged as having been done by the wife, except that she, with her husband, withheld the possession from the plaintiff, nor is any such act found by the court. It appears then to be an ordinary case of husband and wife, residing together upon property claimed by another, who, when bringing an action to recover possession, commences it against both.

1. The question arises upon this record, whether the suit could be brought against the wife jointly with her husband for withholding the possession of the land, when there is not alleged or shown any fact done by her contributing to the plaintiff's cause of action. I have not been able to find any direct authority on this question. An action of detinue will not lie

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against husband and wife at common law, because the wife cannot detain the chattels. *Marsh's case*, 1 Leonard, 312. *Isaac v. Clark*, 2 Bulstrode, 308. 1 Chitty on Plead. 106. In *Keyworth v. Hill*, 3 Barn. & Ald. 687, it was said by Bayley, J., to be quite clear that, in trespass, the husband and wife might be jointly sued, for the reason that the action is founded on the wrongful act of the defendants. In that case, an action of trover was sustained against husband and wife for conversion after marriage, the question arising upon a motion after verdict in arrest of judgment. In *Estell and wife v. Fort*, 2 Dana, 240, it was held, upon authority, that a *feme covert*, though she may be liable for a tort actually committed by her in person, cannot be held responsible for advising a wrong or assenting to it, either before or after its perpetration by another. She cannot be made a trespasser by construction, as a person *sui juris* may, in consequence of the exercise of a voluntary judgment or will. In *McKeown et ux. v. Johnson*, 1 McCord, 578, it was held, that a wife cannot commit a trespass (so as to be liable to an action) in the presence of, or in connection with her husband. In such case, she is supposed to act under his authority, and he alone must be sued. Where the trespass is committed by the wife alone, the husband must be joined in the action; but the declaration must state that it was committed by the wife. The same doctrine is maintained in *Park v. Hopkins*, 2 Bailey, 411.

It is apparent that the petition does not allege any act by the wife separate from the act of her husband, and the court finds no act of the wife by simply finding that, at the commencement of the suit, the husband and wife were in possession of the property.

The fact that the plaintiff's title, under which he claims a right to the possession, is derived from the husband and wife, does not render it proper to make her a party defendant. Without going at greater length into the case, it is the opinion of the court that this action should not have been maintained

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against the wife on the case stated in the petition, and that the judgment against her is erroneous.

With the concurrence of the other judges, the judgment is reversed, and the cause remanded.

LEE *et al.*, Respondents, *vs.* LEE, Appellant.

1. A debtor who employs another to buy in his property, at a sheriff's sale, with no other view than to prevent a sacrifice of it, is not guilty of a fraud.
2. A case will not be reversed for the exclusion of evidence, unless an exception is taken at the trial.

Appeal from Jefferson Circuit Court.

J. A. Beal, for appellant.

M. Frissell, for respondents.

SCOTT, Judge, delivered the opinion of the court.

This was a proceeding on the part of the respondents, who were the widow and children of A. Lee, deceased, against Giles Lee, the appellant, and brother of A. Lee, to obtain a conveyance of the legal title of several parcels of land from the appellant, Giles Lee, which, it was alleged, he held in trust for his deceased brother, having purchased the same with his money, and at his instance and request. The lands, it seems, belonged to A. Lee, deceased, and were sold under an execution against him, and bought in for him by his brother, the appellant. The answer sets up the defence, that the purchase was made for A. Lee, deceased, whilst he was largely indebted, for the purpose of hindering and delaying his creditors. There was a trial by the court, and a judgment for the plaintiffs, from which the defendant took an appeal to this court.

The only error complained of is, that the court refused to receive evidence of the alleged fraud in the purchase made by

the appellant. It is conceived, that the proper course for the appellant, under the circumstances, was, to have excepted to the action of the court on the trial, in refusing to receive the evidence of fraud offered by him. The question then would have properly been before this court, and it might have been determined whether it was admissible under the pleadings. There is no evidence of any fraud preserved in the record. A debtor who employs another to buy in his property at a sheriff's sale, with no other view than to prevent a sacrifice of it, by no means can be said to commit a fraud. The appellant not having excepted at the proper time, it was too late after the trial to raise an objection to the refusal to entertain evidence, on the ground that it was not warranted by the state of the pleadings. We feel no reluctance in coming to this conclusion, as the defence, though tolerated by law, was a most unconscionable one, coming from a brother against the widow and children of a deceased brother. Judge Ryland concurring, the judgment will be affirmed; Judge Gamble not sitting.

PAGE, Respondent, vs. FREEMAN, Appellant.

1. Under the new code, it is not necessary that facts should be stated in a pleading according to their legal effect.
2. Several parties engaged in an assault and battery, may be sued jointly or separately; but if separate suits are brought, the plaintiff will be put to his election between the judgments, as there can be but one satisfaction.

Appeal from St. François Circuit Court.

Nbell & Beal, for appellant.

Gale, for respondent.

SCOTT, Judge, delivered the opinion of the court.

This was an action for an assault and battery. The petition stated that the defendant conspired with, aided and abetted a

certain Jesse Edwards to assault, beat and otherwise ill-treat and abuse the plaintiff, and by and in consequence of such conspiracy, aiding and abetting by said defendant, he, the said Jesse Edwards, did assault, beat and otherwise ill-treat and abuse the said plaintiff, to the damage, &c. A demurrer was put in to this petition, which was overruled, and the defendant answered, denying the allegations therein contained. On a trial of the issue, there was a judgment for the plaintiff for the sum of \$147 50. Afterwards, the defendant moved the court to compel the plaintiff to elect between the damages recovered in this action, and those recovered against Jesse Edwards in another action, for the same assault and battery, and produced a record showing a recovery against Edwards for the same cause, for the sum of two hundred dollars. This motion was overruled, and the defendant appealed.

1. By the common law, all were principals in an assault and battery, as in other trespasses. He who counselled, aided or assisted in any way the commission of the wrong, was, in the eye of the law, as much a principal as he who actually inflicted the blows, and the declaration against him who counselled or aided was, consequently, the same as against him who actually committed the violence. Chitty, 91. *Canefox v. Chapman & Willes*, 7 Mo. Rep. The petition of the plaintiff is clearly bad as a declaration at common law. According to its rules, it contains no cause of action. But the present practice act will support the petition, as it requires the truth of it to be supported by affidavit, and as there may be those who would be unwilling to swear to a statement of the facts, represented according to their legal effect. It cannot be a matter of any consequence, as all of the old forms are done away with. The facts being stated as they really occurred, the mind applies the law to them. But in deviating from the established forms of pleading, the law did not design to change the rights of the parties.

2. In case of a joint trespass, the plaintiff may sue two or more of them jointly, or may sue them separately, and may recover a judgment against them. But for one trespass or wrong

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he can have but one satisfaction. It is like a joint promissory note. A satisfaction by one of the makers will discharge it. A trial and recovery against one trespasser will be no bar to a trial and recovery against another. But (where separate actions are brought, as there can be but one satisfaction, the plaintiff is put to his election between the verdicts, and execution is sued out accordingly.) If the plaintiff has received satisfaction for the wrong done from Edwards, he cannot recover another satisfaction for the same wrong. If he has put himself in a situation which prevents his election, it is his own act. The court, in such case, would relieve the defendant, in the same manner as would be done, should it be made to appear that one of the judgments or executions against a defendant had been satisfied. 1 John. 290. 1 Pick. 62.

The other judges concurring, the judgment will be reversed, and the cause remanded, and the Circuit Court directed to proceed in conformity to this opinion.

VALLE, Respondent, vs. BRYAN, Appellant.

1. County and probate courts, in the exercise of their discretion, should not order doubtful titles to be sold at administration sale, when the doubt may easily be removed by a suit.
2. A trust results to a father, who advances money to his son to enter land for him, with which the son enters the land in his own name.
3. A resulting trust is an equitable estate which may be sold at administration sale.

Appeal from Washington Circuit Court.

Vallé brought this suit to obtain from Bryan the legal title to a tract of land, claiming to be the equitable owner. It appeared that Louis LeClerc, in his life-time, furnished his son, Francis, with money to enter the land for him, (Louis.) Francis entered the land in his own name. After the death of both father and son, the land was sold by each of their administrators under an

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order of court. The plaintiff claims under the father. The defendant claims under the son, with notice of the facts. The court below gave a decree vesting the title in the plaintiff, and the defendant appeals.

J. W. Nbell, for appellant.

M. Frissell, for respondent.

SCOTT, Judge, delivered the opinion of the court.

1. It is obvious that the sales of the land in controversy have taken place under such circumstances as to cause a sacrifice of it, without producing any benefit to either of the administrations. It is bad policy in the county courts to order sales where there is a doubt about the title of the land ordered to be sold, when that doubt may be easily removed by a suit. The courts may unquestionably sell estates, the titles of which are doubtful, but a wise exercise of discretion would lead them, in such cases, to postpone a sale until the title is adjudicated. Certainly, it can be of no advantage to make a sale, when it is foreseen that the money arising from it will not pay the expenses with which it is accompanied. There are titles that the law authorizes to be sold without reserve, but the title in this case is not one of that class, and no consideration of propriety required a sale under the circumstances that existed in the present case. The law does not require a useless thing to be done, and surely the court will not be compelled to pass away the title of an heir, when it is seen that no good to the estate will result from such a step. The consideration paid by Bryan is not mentioned in the proceedings, and we may take it that it was merely nominal, and so the two families have lost the land, without any advantage to either of them.

2. The evidence in the cause, and the facts found by the court, warranted the judgment that was rendered. If Francis LeClerc was entrusted by his father with money to enter land for the father, and entered it in his own name, nothing is clearer than that a trust resulted to the father. Bryan purchased with notice of this trust, and can occupy no better

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ground than that on which Francis LeClerc stood. He has not stated the consideration he paid, so that it does not appear that he is a purchaser for a valuable consideration, without notice. He alleged that he paid a valuable consideration, but, if that consideration was merely nominal, in comparison with the real value of the land, it would be difficult to make it appear that his purchase was of a character which the law favors.

3. The law directs that all the right, title and interest the deceased had in the premises sold, at the time of his death, shall pass to a purchaser, under an administration sale. These terms are sufficiently comprehensive to pass equitable as well as legal titles. The resulting trust to Lewis LeClerc was clearly an equitable estate, and as such could be sold by an administrator. The defense that the conduct of the father showed that he disclaimed any equity in the land purchased by Francis, was not set up, nor is there any evidence in relation to it in the record. The other judges concurring, the judgment will be affirmed.



DELAUSSUS & DELASSUS, Respondents, *vs.* POSTON & MCGREADY,
Appellants.

1. As to the vendor's lien for the purchase money of land, and what is or is not a waiver of it.
2. Where a vendor of land executes a bond, conditioned to convey upon a specified day, subsequent to the time when the purchase money becomes due, a conveyance will not be enforced until the purchase money is paid, although, by the terms of the bond, the conveyance is not expressly made to depend upon the payment of the purchase money.
3. The fact that the vendor procures the notes given for the purchase money to be allowed against the estate of the vendee, is not a waiver of his right to resort to the land.
4. The fact that the equitable interest of the vendee is sold at administration sale, by request of the vendor, who retains the legal title, is not a waiver of the latter's right to enforce his lien against the land in the hands of a purchaser with notice. The right of the purchaser is, to have a deed upon paying the unpaid balance of the purchase money.

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5. The mere addition of the words "*and relinquishes her dower*," in the certificate of a married woman's acknowledgment, will not render it inoperative to pass her own estate.
6. The supreme court can correct no error in a judgment in favor of the appealing party against a party who does not appeal.

Appeal from St. François Circuit Court.

This was a petition, filed by C. E. and L. Delassus against Poston, to enforce a vendor's lien for an unpaid balance of the purchase money of land. McGready was subsequently made a co-defendant.

In March, 1840, the plaintiffs, and their sister, the wife of Peter R. Pratte, being the owners of the land, sold the same to George W. Hoy, who executed three notes for the purchase money, the last of which was payable on the 30th of March, 1842. The first of the notes was signed by J. B. Clardy, as security, to whom Hoy shortly afterwards executed a mortgage on personal property, for his indemnity. The plaintiffs, with Pratte and wife, executed a bond to Hoy, conditioned to convey the land "on or before the 1st day of April, 1842, that day being the day mentioned by a note given by the said Hoy, bearing equal date with this bond, for the last payment of the purchase money." Afterwards, Pratte and wife assigned all their interest in the three notes to the plaintiffs, and executed to them a conveyance of all their title to the land, in order that the plaintiffs might be able to make a deed to Hoy, according to the condition of the bond. This conveyance is not set out in the record, but the finding of the court below states that it was acknowledged before a judge of the county court, whose certificate stated that the wife, on a separate examination, acknowledged that she "executed the deed, *and relinquishes her dower* freely," &c. The officer who took the acknowledgment testified that he made the wife acquainted with the fact that she was conveying her own estate, and that she acknowledged it as such a conveyance. Before either of the notes given for the purchase money was paid, Hoy died, and Clardy administered

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on his estate. The notes were presented by the plaintiffs and allowed against the estate. Clardy, the administrator, under an order of court, sold the personal property mortgaged to him, and with the proceeds paid the first of the notes in full. The personal effects of the estate being exhausted, the county court, upon a petition presented by the administrator, by request of the plaintiffs, ordered all the right, title and interest which Hoy had in the land, at the time of his death, to be sold; and after regular proceedings had, the same was sold, and Poston became the purchaser, at the price of ten cents an acre. The plaintiffs gave public notice at the sale that they had a lien on the land for the unpaid balance of the purchase money. The sale was confirmed by the court, and the administrator applied the proceeds to the payment of the notes held by plaintiffs, leaving a large balance on the notes still remaining unpaid. In the present proceeding, the plaintiffs seek to enforce their lien against the land for this balance.

The Circuit Court, treating the certificate of acknowledgment of the deed from Pratte and wife to plaintiffs as insufficient to pass the wife's estate, made a decree reforming the same, and vesting in the plaintiffs all of Mrs. Pratte's estate in the land. The court then, upon the refusal of the defendants to elect to pay plaintiffs the balance due on the notes, decreed that the land be sold by the sheriff, and that the proceeds, *after payment to Poston of the amount paid by him as purchaser at the administration sale*, with interest, be applied to the payment of the balance due on the notes, with interest; and that the surplus, if any, be brought into court for further direction. From this decree, the defendants alone appealed.

M. Frissell, for appellants. The plaintiffs have lost their lien upon the land by their own acts. They covenanted to convey on a certain day, without reference to the payment of the purchase money. They procured their demand to be allowed against Hoy's estate, and by their request, the administrator procured an order of sale of the land. By the 23d section of article 3 of the act concerning executors and administra-

tors, (R. C. 1835,) the appellants held the land discharged of all liability for Hoy's debts. The fact that they gave notice at the sale that they claimed a lien, can have no effect. The lien was cut off by the sale. *Buford v. Smith*, 7 Mo. Rep. 489. If, however, the lien is not lost, the plaintiffs are not in a position to enforce it, because they cannot make a good title if the defendants should pay the balance of the purchase money. The certificate of Mrs. Pratte's acknowledgment is insufficient to pass her estate, and the court could not reform it.

J. W. Nbell and G. E. Young, for respondents. It was the duty of the plaintiffs first to seek payment from the personal estate of Hoy, the primary fund for the payment of debts, and by so doing, they did not lose their lien on the land, nor evince any intention to abandon it. What is a waiver of a lien is a question of intention entirely. The fact that security was taken for the first of the notes only, that the title was to be made after the last note became due, and that the plaintiffs gave notice of their lien at the administration sale, all show that the lien has always been relied upon. This is clearly a case of an equitable mortgage. 15 Vesey, 329. Poston, at the administration sale, acquired Hoy's title subject to the lien, and the price paid by him shows that he knew it. 2 Story's Eq. §123 *et seq.* *McKnight & Brady v. Bright*, 2 Mo. Rep. 89. The fact that the title bond binds the plaintiffs to convey upon a day certain does not show that they did not rely upon their lien. A court will not enforce the specific performance of a contract to convey, until the purchase money is paid, although the covenant to convey is not made to depend on the payment. *Oliver v. Dix*. 1 Dev. & Batt. Eq. Rep. 605. It was competent for the court to reform the certificate of acknowledgment. 2 Carter's (Ind.) Rep. 385.

GAMBLE, Judge, delivered the opinion of the court.

1. That a vendor retains a lien for the unpaid purchase money of land, even when he has conveyed the same to the

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vendee, and has not waived or discharged the lien, is a settled principle of law. That the taking a bond or note of the vendee has no effect in waiving the lien, is as clearly settled. That a lien may be waived by the act of the parties showing that it was not intended to be retained, has been admitted in all the cases in which the subject has been considered. Chancellor Kent, in *Carson v. Green*, 1 John. Ch. R. 309, says: "*Prima facie*, the purchase money is a lien upon the land, and it lies upon the purchaser to show that the vendor agreed to rest upon other security." Chancellor Walworth, in *Fish v. Howland*, 1 Paige's Rep. 20, reviews the English cases and many American cases upon the point of waiving the lien, and arrives at the conclusion that the lien is waived, whenever any security is taken upon the land, *or otherwise*, for the whole or any part of the purchase money, unless there is an express agreement that the equitable lien on the land shall be retained. In *Gilman v. Brown*, 1 Mason's R., 212, Mr. Justice Story held, that taking the notes of the vendee, with other persons as security, was a waiver of the lien, and this opinion was sustained by the Supreme Court of the United States. *Brown v. Gilman*, 4 Wheat. 291. The mass of American authorities agree with the opinion expressed by Justice Story.

2. But we have in the present case not a conveyance of the land, but a bond to convey upon a certain day, which is stated in the bond to be, "the day mentioned by a note given by the said George W. Hoy, bearing equal date with this bond, for the last payment of the purchase money." Now, although the purchaser gave a note with security for the first instalment of the purchase money, it is evident that, as the conveyance was not to be made until the payment of the last instalment, the title was retained as a security for the payment of the whole purchase money. It would be absurd to suppose that the vendee, under such an agreement, could obtain a specific execution of the contract to convey, without paying the purchase money. Reason and authority both forbid it. The agreement of the parties, as evidenced by the instruments they executed, was,

that the vendors should, at least, be secure in the first instalment of the purchase money, and for that purpose, they were to have personal security for its payment, and they were to rely upon the land for the payment of the other instalments, if the vendee was otherwise unable to pay them, and to give effect to this agreement, the title was retained in the vendors. Where the vendors have title in themselves at the time of the agreement to sell, and, instead of making a conveyance, they make an obligation to convey at the time the last note for the purchase money becomes due, it would require the clearest possible evidence of their intent to release the land from a lien for the purchase money, to justify a court in holding them bound to convey without being paid. No such intent appears in this case. In *Basevi v. Serra*, 14 Ves. 313, Sir Wm. Grant says: "If a party selling an estate chooses to stipulate that the contract shall be completed, and the land conveyed, trusting for the payment of the purchase money to the personal obligation of the purchaser, he cannot afterwards say, you shall not have the estate before you pay, because, under the contract, the right to a conveyance is not dependent on the payment of the purchase money. But if the time had come when the covenant was to be performed, and the consideration was to be paid, the court would not permit the party to receive that which he had purchased, without taking care that he paid the stipulated price for it." *Corsbie v. Free*, 1 Craig & Philips, 74. Batten on Contracts, 108, 65 Law Lib. 79.

3. The fact that the vendors had the notes for the purchase money allowed against the estate of the vendee, after his death, does not affect their right to resort to the land for the payment of the balance of the purchase money. As it is the admitted law, that taking the notes of the vendee for the purchase money has not the effect of waiving the lien for the purchase money, it follows that the enforcement of the notes, in the modes authorized by law, can have no such effect. *Clark v. Hunt*, 3 J. J. Marsh. 558.

4. The fact that the plaintiffs requested the administrator of

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Hoy to procure a sale of Hoy's interest in the land, does not affect their right to have the land sold to pay the purchase money. The third section of the third article of the administration act authorized the county court to order the sale of the interest of the intestate in the land, when there was not sufficient assets to pay for the real estate purchased. A proceeding under this section would have substituted another purchaser in the place of the intestate, and from him the plaintiffs would expect to receive their purchase money. It was their expectation that such would be the effect of the sale, for they attended at the sale, and gave notice to the bidders that there remained a large part of their purchase money unpaid, and that they held the land bound for the balance. Such also must have been the expectation of the defendants, when they bid ten cents per acre for the land, with such notice of the plaintiffs' right, unless they supposed that there was some trick in the law by which they could get the land out from under the plaintiffs' claim, and hold it for the ten cents an acre. Accordingly, they insist that, as purchasers at an administrator's sale, they hold the land discharged from the debts of the intestate. But they forget that they have not a title to the land. They have purchased only an equity, evidenced by a bond which binds the plaintiffs to convey upon the payment of the purchase money. While the right they have purchased may not be subject to sale for the payment of the debts of the intestate, in the modes provided by the statute for such sales in the course of administration, still the debt to the plaintiffs is a specific lien upon this land, which is to be enforced against it, when claimed by any person under the intestate, and without the payment of which, equity will not recognize the right of the defendants to have the title. It will be enforced against the land in the hands of any person holding under Hoy, with notice.

5. It is objected to the right of the plaintiffs that they are not able to comply with the terms of the title bond, because, in the acknowledgment of the deed from Pratte and wife to the plaintiffs, conveying the title of Mrs. Pratte, she acknowledg-

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ed that she "*relinquished her dower* in the premises," when her own estate was conveyed. This deed is not spread upon the record, and we have to take the objection to the acknowledgment as it appears to have been made when the deed was before the Circuit Court. The deed was dated October 13th, 1841. This objection was considered in the case of *Chauvin v. Wagner*, 18 Mo., 531, which arose under the act of 1825, and a majority of the court held, that it was not a substantial objection to the acknowledgment, thereby overruling *McDaniel v. Priest*, 12 Mo. 545. The act of 1825 was more particular in regard to such acknowledgments than the act in the code of 1845. As this record presents the case to us, there was no necessity for the court, in its judgment, to correct the mistake in the acknowledgment, and therefore we take no notice of the question, whether it is competent for a court to correct such mistakes.

6. The judgment or decree in this case requires that, out of the proceeds of the sale which is ordered to be made, there shall be paid to the defendants, the sum which they paid for their purchase at the administrator's sale, with interest thereon. This judgment is not appealed from by the plaintiffs, and therefore we cannot correct an error made in favor of the defendants. If we could, it is certain that the defendants would not be allowed to speculate upon terms of such safety as the decree permits. The sum they paid belongs to the representatives of Hoy, for the right of Hoy, which the defendants purchased, and under that purchase, they are entitled to the surplus which the land may produce, after satisfying the claim of the plaintiffs. But the consideration of their purchase should be distributed among Hoy's representatives. If the land does not satisfy the claim of the plaintiffs, then the speculation of the defendants should produce a loss to them of the amount they have paid for their purchase of Hoy's interest. But as there is no appeal before us, in which complaint is made of this part of the decree, we cannot reverse so much as we hold to have been erroneously in favor of the defendants. The judgment is, with the concurrence of the other judges, affirmed.

Smith v. St. Francois County Court.—Smith v. Myers.

SMITH, Appellant, *vs.* ST. FRANCOIS COUNTY COURT, Respondent.

1. Judgment affirmed, because no question of law was saved.
2. The new code does not apply to proceedings upon mandamus.

Appeal from St. Francois Circuit Court.

Nbell & Frissell, for appellant.

J. A. Beal, for respondent.

GAMBLE, Judge. This is a proceeding against the county court of St. Francois county, upon an alternative mandamus, issued by the Circuit Court of that county. The county court having answered, a replication was filed, and the cause submitted to the court to try the questions of fact, as a jury. Upon the trial, no question of law was made, as far as the record shows, either in relation to evidence or in the form of instructions. The code of practice does not apply to proceedings upon mandamus. Art. 30, section 6. As the record shows no question of law saved, according to the practice in such cases, the judgment must be affirmed.

SMITH, Respondent, *vs.* MYERS, Appellant.

1. Where a mother-in-law performs menial services in the family of her son-in-law, it is for the jury to determine from all the circumstances, whether it was under an implied contract for wages, or not.

Appeal from Ste. Genevieve Circuit Court.

J. W. Nbell, for appellant.

B. A. Hill, for respondent.

SCOTT, Judge, delivered the opinion of the court.

This was a suit commenced by the plaintiff against the defendant for the value of her services performed for him. She

had a verdict for \$300. Catharine Smith was the mother-in-law of the plaintiff, who was a poor man, without servants. She was brought to this country by her son-in-law, and continued in his family for ten or twelve years, performing the services that would devolve on a woman in a family of the condition of that of the defendant — services which are usually performed by servants in those families which are able to employ them. Shortly after the defendant married, the plaintiff left his house, in a destitute condition, and was put upon the county for a support. There was no evidence of any contract between the parties respecting wages.

The court instructed the jury that, if the plaintiff lived with the defendant, as a member of his family, being a mother-in-law, and not in the capacity of a servant, she cannot recover, unless there was an agreement for wages; that, if she was a member of the family, without any contract for wages, she cannot recover, unless she was turned off without good cause, after she had become, by age, incapable of supporting herself; but if she was turned off without cause, after living with the defendant as a member of his family for a series of years, after she had become old and infirm, she was entitled to full pay for her services.

1. There is no evidence in the record, showing the reason which induced the plaintiff to leave the defendant's family. No principle is perceived on which the instruction given can be sustained. They seem to imply that it was the legal duty of the defendant to support the plaintiff. Whatever moral obligations may have rested on the defendant to support the plaintiff during her old age, in consideration of her previous services, we are not aware of any principle in law which, in the absence of all contract, express or implied, would impose such an obligation upon him, as the plaintiff was always at liberty to leave the defendant at any time.

The general rule is, that, whenever service is rendered and received, a contract of hiring or an obligation to pay will be presumed. This is an undoubted rule between strangers. But

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a relationship between the parties may exist, such as will cause the presumption that the services are acts of gratuitous kindness and affection. In all such cases, it will be a question for the jury, taking into consideration the nature and degree of the relationship, the circumstances in life of the parties, and other matters which may affect it, whether there was any implied contract for compensation. The degree of the relationship may strengthen or diminish the implication, according to its proximity or remoteness. It may be such as should have little or no weight with the jury. But if a destitute person is received from charity, provided with necessaries and set to work, he is under no obligation to remain, nor has he any claim for wages, unless there be some express agreement. 1 Parsons on Contracts, 531. The other judges concurring, the judgment will be reversed, and the cause remanded.

COFFMAN & HORINE, Respondents, vs. HUCK, Appellant.

1. Where a court, by its decree, rescinds a sale and conveyance of land, at the instance of the vendee, a mortgage given for the purchase money is rescinded, as a necessary consequence; and it is error in the decree to award a special execution against the mortgaged property, to satisfy damages allowed to the vendor for the vendee's use of the land.
2. Where there is no bad faith, a vendor cannot be made liable for improvements put by the vendee on land, the title to which fails. The measure of damages is the purchase money and interest.
- 3 A party who enters upon land as a vendee, cannot, upon a subsequent rescission of the contract of sale, be made liable for the rent of the land as a tenant. He is only liable to the extent of the benefit actually derived by him from the use of the land, in ascertaining which, he may be allowed for all outlays in improvements, including those put upon a portion of the land represented, by mistake, to have been embraced in the conveyance to him, but which, in reality, was not.

Appeal from Ste. Genevieve Circuit Court.

Petition to foreclose a mortgage given to secure the purchase money of land sold and conveyed by Coffman & Horine to

Huck. The mortgage covered not only the land, the purchase money of which it was given to secure, but also another tract owned by Huck, known as the "Grand Marais tract."

The defence set up was, that when Huck purchased the land, the plaintiffs fraudulently represented that it all lay in a body, and that it included certain improved land, whereas it consisted of four separate tracts, only two of which were contiguous, and did not include the improved land, which was necessary to the enjoyment of a mill, situated upon one of the tracts; that before defendant discovered that the improved land was not covered by his conveyance, he built upon it a new dwelling house at a cost of \$1000, and made other improvements upon it, and also expended \$800 in repairing the mill; that after the discovery, he offered in writing to rescind the sale upon just terms, which the plaintiffs declined to do; that since their refusal, he had expended \$900 in repairs upon the mill necessary to preserve the same from destruction. He prayed for a decree rescinding the conveyance, and compelling the plaintiffs to enter satisfaction of the mortgage and deliver up the bonds; for a special judgment against the property conveyed to him by plaintiffs, for his expenditures in improvements, and for a perpetual injunction.

The cause was heard by the court, but the record contains no finding of the facts, other than a statement in the decree that the court found that, at the time of the sale from plaintiffs to defendant, a mistake was made in regard to the location of one of the tracts conveyed, which materially affected the enjoyment of the property, and greatly impaired its value.

It appeared in evidence that the land which was erroneously supposed to have been included in the conveyance to the defendant had been improved by the owners prior to plaintiffs, and had been treated by all of the owners as a part of the land described in the deed, and that the plaintiffs so represented to the defendant, when he purchased; but when the lines were afterwards run by a surveyor, it turned out that it was public land at the time of defendant's purchase, and had since been

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entered by a coal company. The conveyance to defendant was made in March, 1843. In 1849, after the discovery of the mistake, the defendant notified the plaintiffs of his readiness to rescind the contract, but they could not agree on the terms. A witness testified that the property conveyed to defendant, including the mill, was worth an annual rent of \$500. There was evidence to sustain the answer as to the value of defendant's improvements. This suit was commenced in October, 1851, and a decree rendered in May, 1853.

The court decreed a rescision of the conveyance, but awarded to the plaintiffs, as damages for the defendant's use and occupation, "after deducting the cost of necessary repairs," the sum of \$2,966, and decreed that the "Grand Marais" tract should be held as security for the payment of this sum, and should be sold under a special execution, as in case of the foreclosure of a mortgage, unless the same was paid on or before a specified day.

From a motion for a review filed by the defendant, it appears that the court found that there was no fraud in the sale from Coffman & H. to Huck; that the rents of the mill and land, during the occupation of the defendant, were of the value of \$3,666., and the value of the repairs made by defendant was \$700. It appeared also, that the court refused to allow the defendant for his improvements on the land erroneously supposed to be included in his purchase. The defendant appealed.

Noell and Young, for appellant. The court below erred in making the defendant liable as a tenant for the annual value of the land, during his possession under the purchase. *Sugden on Vendors*, 249, and authorities there cited. He was at most only liable for what he actually received, and not for what the property is reasonably worth. *Richardson v. McKinson*, Littel's Select Cases, 321-22. *Smith v. Babcock*, 2 Wood. & Minot, 297. *Edwards v. McLeay*, 1 Cooper, 208, 218. And he should be allowed for his improvements and all damages he sustained by the failure of the contract. No fraud *in fact* was necessary to the liability of the plaintiffs to this ex-

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tent. The falsity of their representations was a fraud in law. Litt. Select Cases, 323. 3 J. J. Marsh. 257. *Craig v. Martin*, 3 J. J. Marsh. 55. *Griffith v. Depew*, 3 A. K. Marsh. 181-2. 3 Cranch, 281-2. 8 Mees. & Wels. Ex. Rep. 118. The judgment should be reversed for want of a sufficient finding of the facts.

Hill, Grover & Hill, for respondents. When the title of real estate fails, after an executed contract of sale, the measure of damages, in an action on the covenants of seizin and for quiet enjoyment, is the consideration money paid, with interest, for so long a time as the vendee may be compelled to pay for mesne profits, and the costs of suit by which he was evicted. He can recover nothing for increased value, nor for improvements. *Staats v. Ex'rs of Ten Eyck*, 3 Caines, 311. *Pitcher v. Livingston*, 4 J. R. 1. *Kinney v. Watts*, 4 Wend. 38. *Kelly v. Dutch Church*, 2 Hill, 15. On an executory contract for the sale of land which the vendor believes to be his own, and when there is no fraud on his part, if the sale falls through in consequence of a defect of title, the measure of damages is substantially the same as in the case of an executed sale. 2 W. Black. 1078. *Baldwin v. Munn*, 2 Wend. 399. *Peters v. McKeon*, 4 Denio, 546. Here there was no fraud on the part of the plaintiffs. The court, however, allowed the defendant for necessary improvements, which was more than he was entitled to, under the rule above stated. The finding as to the value of the use and occupation of the land was sustained by the evidence. The defendant, however, insists that he is only liable for rents actually received by him, and not for his own use and occupation. If this is so, then a party has only to put out the tenant, and occupy in his own person, to escape liability.

SCOTT, Judge, delivered the opinion of the court.

1. The respondents having taken no cross appeal, the propriety of so much of the decree as rescinds the sale of the land, the purchase money of which the mortgage was given to se-

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cure, cannot now be enquired into. The sale being rescinded, the mortgage was at an end, as its entire consideration had failed: There was no longer any debt secured by it, consequently it became of no effect. The original contract having been destroyed, the mortgage, as an incident, fell with it. The mortgage falling, there was no power in the court to hold the land mortgaged subject to any claims the plaintiffs might have, arising from a rescision of the contract. Consequently, the decree of the court, subjecting a portion of the mortgaged premises to sale for any damages resulting from the rescision of the contract was erroneous. The defendant in an execution has a right to select what land seized under it shall first be sold, and it is clearly erroneous for a court to take away that election from him, and to condemn a particular tract of land to be sold. R. C. 481.

The sale having been rescinded, and that portion of the judgment not having been appealed from, the inquiry will be, what compensation the plaintiffs are entitled to, for the use and occupation of the premises by the defendant under his purchase.

2. As to the improvements made upon that portion of the land conveyed to the defendant, the title to which has failed, we can find nothing in the record which should subject the plaintiffs to a liability for their value. The evidence entirely fails to establish any bad faith on their part. Where there is no bad faith, it is clear that the purchase money, with interest, is the measure of damages in an action for a breach of covenant for title. Sedgwick, 207-8-9.

3. We do not hesitate to express our dissatisfaction with the mode adopted, in order to ascertain the value of the rents and profits of the premises, as against the defendant. The sale was rescinded on the ground of mistake—a mistake into which the defendant was led by the plaintiffs. When the result of the calculation of the value of the rents is contemplated, the error is apparent. The contract was made in February, 1846; the suit was commenced in October, 1851; the decree rendered in May, 1853, rescinding the contract, and the rents are adjudged

to be \$3,666. The purchase money was \$5000. Thus, in less time than eight years, a purchaser, taking possession under a belief that he was the owner, induced by the mistake of the plaintiffs, is held accountable for an amount equal to nearly three-fourths of the purchase money, by way of rent. One who enters as a purchaser on lands is influenced by motives very different from those which actuate a tenant taking a lease at a certain rent, and he should not be chargeable as such when he loses his purchase, without his fault. As not the least blame attached to the defendants' conduct, and as there was no expectation of being charged as a tenant, he should be liable only for the profits he made on that portion of the land which really belonged to the plaintiffs. So far as he was benefitted by the occupation, he is liable, and on no principle of law or justice should he be held to a more extended accountability. He should be allowed for all improvements made upon the land, and it should not be lost sight of that here the claim for improvements is made by way of recoupment against a claim for rents. Under such circumstances, justice requires that such claim should be regarded with liberality. It was no fault of the defendant that he was there. So soon as the mistake was discovered, he offered to reconvey the land and rescind the contract, and that was prevented by the plaintiffs. The weight of the English and American authority is, that when one takes possession under a contract to convey, he does not thereby create the relation of landlord and tenant between the vendor and himself, and that an action for use and occupation will not lie against him, until there has been an abandonment of the contract. But this principle does not apply here. This is a much stronger case. Here the land was actually conveyed. The defendant can only be held liable to the amount that he has been benefitted by the occupation, as he has not paid the purchase money, and not for what a single witness may say was the annual value of the premises. By such a process, the plaintiffs, in a short time, taking advantage of their own refusal to rescind a contract, which the judgment in this case as-

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sumes ought to have been rescinded, would have received the price of the land, and then have taken the land itself. We have said, that the defendant, Huck, would have no claim to damages for the improvements erected upon the land not belonging to the plaintiffs, in an action for a breach of the warranty of title; but we are of opinion that, in determining the question, how far the occupation of Huck of the premises in controversy has been beneficial, the fact may be considered that outlays for improvements were made on a portion of the land to which the plaintiffs had no title, and from a consideration of this, together with the other circumstances, it will be determined how far Huck was benefitted by his occupation of the premises, the contract for the sale of which has been rescinded. The judgment is reversed, and the cause remanded, the other judges concurring.

RUSH *et al.*, Respondents, *vs.* RUSH *et al.*, Appellants.

1. In a proceeding to set aside a will, it is erroneous to arrest a judgment as to some of the defendants, and enter a final judgment against the others.
2. Where an infant, who is joined with other defendants, appears by attorney, a judgment against all the defendants will be reversed as to all.

Appeal from Perry Circuit Court.

J. W. Nobell, for appellant.

M. Frissell, for respondent.

SCOTT, Judge, delivered the opinion of the court.

This was a proceeding by the respondents to set aside the will of their ancestor, Wm. Rush, on the ground of insanity. On a trial, there was a verdict for the respondents. It appears on the face of the proceedings, that two of the defendants were minors and appeared by attorney. For this cause, on motion, the court arrested the judgment as to the infants, and entered

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a final judgment against the adult defendants. From this judgment they appealed.

This cause does not raise the question, whether any other party than the infant himself can take advantage of his infancy. The judgment was properly arrested as to the infants, and the only inquiry is, whether it should not have been arrested as to all of the defendants.

1. This was a proceeding to set aside a will. The will was set aside as against some of the defendants, and a final judgment rendered against them. Now if, between the parties as to whom the judgment has been arrested, there should, on another trial, be a verdict in favor of the will, in what condition will the court be? Will it certify down to the county court that the will is established and that it is not established? There can be but one final judgment in a cause. Even if the court was right as to the law, when the judgment was arrested, as to some of the defendants, a final judgment as to the others should have been suspended, until there was a verdict between those as to whom the judgment had been arrested. But the true ground is, that as the proceedings were erroneous as to the infants, they were erroneous as to all. It is true that, in actions *ex contractu*, in which an infant is joined with an adult, there may be a judgment against the adult, whilst the infant may have a verdict on the ground that his privilege is personal to himself. But this doctrine has never been applied to writs of error. An infant or any other party may be severed in an action of trespass, yet it is the well settled law, that if, in such action, an infant enter his appearance by attorney, with others, and there is a judgment against them all, the judgment will be reversed as to all, and that such a consequence cannot be avoided under a notion of a right to sever in the court below. 1 Roll. Abr. Error E. Pl. 9. *Cruikshank v. Gardner*, 2 Hill, 333. 2 Saun. 212. 1 Ld. Raym. 600.

The other judges concurring, the judgment is reversed, and the cause remanded.

WILKINSON *et al.*, Appellants, *vs.* ROZIER, Respondent.

1. Spanish marriage contracts are within the meaning of the act of December 22, 1824, requiring all marriage contracts to be recorded within six months from the taking effect of the act, in order to affect titles, except as between parties thereto and persons having actual notice.

Appeal from Perry Circuit Court.

Noell and *Frissell*, for appellants. 1. On the death of Marie Pratte, the community created by the marriage contract was dissolved, and one half of the community property became, *by title absolute and irrevocable*, the property of her heirs, subject only to the payment of the community debts. 2. During the existence of the community, the husband was the agent through whom the property was to be applied to the payment of the community debts; but after its dissolution by the death of the wife, the application could not be made by the husband, but must be made by the intervention of the law. *Brousard v. Bernard*, 7 Lou. Rep. 222. *Hart v. Foley*, 1 Lou. Rep. 378. *German v. Guy*, 9 Lou. 583. *Moreau v. Detchemendy*, 18 Mo. Rep. 522.

G. E. Young, for respondent. 1. The property in controversy did not enter into the community, because it was acquired by Pratte after the act of 1824, requiring all marriage contracts to be recorded, and was transferred by him while the contract was yet unrecorded. R. C. 1825, p. 526. *Lafarge v. Morgan*, 11 Martin, 527. *Ib.* 554. 2. By the Spanish law, the community property was subject to the payment of the community debts, and in the absence of any law in force at the time of the dissolution of the community, prescribing the mode in which the application was to be made, the husband, who held the legal estate, might make the application, and a conveyance by him in payment of the community debts, when shown, is a bar to the claim of the wife's heirs.

SCOTT, Judge, delivered the opinion of the court.

This was an action in the nature of an ejectment, to recover possession of lands to which the plaintiffs allege they are entitled. The defendant denies the right of the plaintiffs, and derives title to the premises through the father of the plaintiffs. The claim of the plaintiffs rests on a marriage contract entered into between Joseph Pratte and Marie Valle, their ancestors, on the 4th February, 1797, at the village of Ste. Genevieve. By this contract, it was stipulated that all acquisitions made during the marriage should enter into and become a part of the community property, and on the dissolution of the community by the death of either party, his or her share of the community should go to his or her heirs. By two deeds, dated respectively in 1830 and 1837, Joseph Pratte acquired the legal title to the lands in controversy; consequently, they were community property, as Mrs. Pratte did not die until the year 1841, leaving the plaintiffs, her children, as her heirs at law. After her decease, in 1842, Joseph Pratte, by deed, mortgaged one of the tracts of land in dispute under which it was passed to the defendant. The other tract was conveyed by Joseph Pratte in 1842, in trust to secure the payment of a debt due by him, and the defendant derives title under this deed of trust. The plaintiffs, who are seven of the eleven children of Joseph Pratte and Marie Valle, their parents, claim seven-elevenths in one half of each of the two tracts, as heirs of their mother, who, by the marriage contract, was entitled to one half of all the estate acquired during the marriage.

1. The marriage contract between Joseph Pratte and Marie Valle was never recorded in pursuance to the fifth section of the act of 22d December, 1824, entitled "an act concerning marriage contracts," which enacted that all marriage contracts, heretofore entered into, may be recorded in the like manner as such contracts hereafter entered into; and from the time of recording the same shall, (as to all property affected thereby,

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within the county in which it is recorded,) impart full and perfect notice to all persons of the contents thereof, and no such marriage contract which shall not be recorded within six months after the taking effect of this act, shall be valid or binding or in any wise affect any property, real or personal, (except between the parties thereto, and such as have actual notice thereof,) until the same shall be deposited with the recorder of the county wherein such property is situate, for record.

In the case of *McNair v. Dodge*, 7 Mo. 404, it was held, that Spanish marriage contracts, made prior to the transfer of Louisiana to the United States, were not within the provisions of the act above cited; consequently, that they were valid against subsequent purchasers, although they were not recorded. In looking into that case, it will be perceived that the point of notice was not involved in it, and that the opinion is supported on the facts of the case, without any inquiry into the fact of notice. The case involved the title to a slave, who was sold by one having only a life estate in the slave, and the suit was brought by the remainder man, after the termination of the life estate, against the purchaser. It is clear that, in such a case, the question of notice was unimportant, as the purchaser, whether with or without notice, could obtain no greater interest in the slave than was possessed by his vendor.

As the opinion in *McNair* and *Dodge* was delivered long after the period within which Spanish marriage contracts were required to be recorded, in order to save their validity as against subsequent purchasers, no complaint can be made by those interested that they were lulled into security, and neglected to record their contracts in consequence of it, if we should now question its correctness.

The pretensions set up by those claiming under the contract involved in this suit, the incidents asserted as belonging to it, overriding all our laws regulating the transmission of the titles to real estate, arrest our attention and cause us to deliberate whether the general assembly could have designed to omit the recording of instruments, the ignorance of the contents of which

may so seriously affect the interests of innocent purchasers. The plaintiffs claim that, by virtue of a marriage contract, made in 1797, they, as heirs of their mother, on her death, in 1841, acquired the legal title to one half of the lands conveyed to their father during the existence of the community, although the title to those lands vested in him alone, and has been conveyed away by him to purchasers for a valuable consideration, without notice. The pretension is that, after the dissolution of the community by the death of the mother, the legal title to one half of the lands acquired by the husband during the marriage, though the deeds for these lands were made to him alone, vested in the heirs of the mother, and that his conveyance, subsequent to her death, was ineffectual to convey away their interest to a purchaser for a valuable consideration, without notice.

Without acquiescing in the correctness of the opinion which attributes such force and effect to a marriage contract made under the Spanish laws, we are of the opinion, that the act of 22d December, 1824, above cited, includes the marriage contract in question, and that the pretensions now set up for such instruments, is a strong argument in support of such a construction of that act.

It is clear that the existence of Spanish marriage contracts was within the legislative knowledge of this state. The frequency of their occurrence among the early French inhabitants of this state must have been known to our legislature in 1824. The act of the 18th of June, 1808, section 5, shows that the existence of such contracts had been recognized by legislative acts. The reference to marriage contracts heretofore made in pursuance to any "laws, usages and customs now in force in this territory," clearly indicate that contracts made under the Spanish law were intended. If we suppose that a knowledge of the existence of such contracts was possessed by the general assembly, when it was enacted "that all marriage contracts heretofore entered into" should be recorded, we must be led to the conclusion that Spanish marriage contracts were included,

without regard to the time when such contracts were made. There is no reason why those made prior to the change of government should not be included, as well as those made subsequently. Such an act was clearly within the constitutional powers of the state legislature. Nothing is more common than to prescribe limitations to actions on contracts already made, or to require deeds already in existence to be recorded. Such legislation did not affect the treaty of Louisiana. These contracts are within the words, and they are also within the reason of the act; why then should they not be construed to be embraced within its meaning? As to the argument that they were in a foreign language, and would not have been understood had they been recorded, it may be answered, that the opinion in the case cited makes them notice to all the world in a foreign language, though unrecorded. If unrecorded in a foreign language, they would be notice; surely the putting them upon record, though in a foreign language, would facilitate the diffusion of a knowledge of their contents.

The case of *McNair* and *Dodge* might have been decided without broaching the question of the construction of the act of 1824. That case did not present the consequences of holding that Spanish marriage contracts were not comprehended by the act, so forcibly as they are presented in the case under consideration; nor was it of a character to show the full operation of the act, as then construed; under such circumstances, it is not surprising if considerations were overlooked, which should have had their influence in determining the question.

This view of the case destroys no right growing out of the contract; it affects no right secured by the treaty, but postpones the claim of the plaintiffs to that of a fair purchaser, in consequence of the failure to record an instrument by which notice might have been imparted to that purchaser. The other judges concurring, the judgment is affirmed.

FRISSELL, Appellant, vs. ROZIER, Respondent.

1. Husband and wife cannot release to each other their respective interests in land by deed of partition.

Appeal from Perry Circuit Court.

M. Frissell, in person.

G. E. Young, for respondent.

SCOTT, Judge, delivered the opinion of the court.

This was an action against the defendant, Rozier, in the nature of an ejectment, to recover possession of one undivided sixteenth of a tract of land, being lot numbered five in the partition deed herein afterwards mentioned, claimed by the plaintiff, Frissell, under one of the heirs of Marie Pratte, the wife of Joseph Pratte, formerly Marie Valle.

The marriage contract involved in this case is the same that was considered in the case of *Wilkinson et al., v. Rozier*, decided at the present term. So far as the law arising from that contract is involved in the present suit, it must be regarded as settled. The only remaining point grows out of the deed of partition, made by the heirs of Francis Valle, on the 6th May, 1839. To state the matter succinctly, and in a way to be comprehended, Joseph Pratte had in his own right a share in the league square, descending from Francis Valle, sr., to his heirs. This share, by agreement among the heirs, was set apart and assigned to those under whom Joseph Pratte claims. Marie Valle, afterwards Marie Pratte, was not a party to this agreement. Marie Pratte had a share in the league square in her own right, as the heir of Francis Valle, sr. This share was set apart and designated. By a deed of partition, all who were interested in the league square made partition, and mutually released to each other. Now Joseph Pratte, who was a party to the deed of partition, and who claimed lot num-

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ber five, in his own right, derived from one of the heirs of Francis Valle; and Marie Pratte, his wife, was a party claiming lot number four as one of the heirs of Francis Valle in her own right, and was a party to the deed of partition. Now the question is, whether Joseph Pratte and Marie, his wife, could mutually release to each other their respective interests in lots numbered four and five, by the deed of partition, which was executed between them and the other parties in interest. According to the principles of our law, this could not be done. The legal unity of husband and wife prevents this. This is a rule of law which, however technical, this court does not feel at liberty to overthrow. 1 Coke, 130. Reeves' Domestic Rel. 90. B. Mon. 545. There was no partition then between Pratte and his wife as to lots numbered four and five. Mrs. Pratte had one undivided half in each of those lots. This was paraphernal property, at least it did not go into the community created by the marriage contract. The title was in her, and on her death it descended to her heirs.

The other judges concurring, the judgment is reversed, and the cause remanded.

KLAMP, Respondent, vs. RODEWALT, Appellant.

1. Judgment reversed because the instructions were calculated to mislead.

Appeal from Perry Circuit Court.

J. W. Noell, for appellant.

G. E. Young, for respondent.

RYLAND, Judge, delivered the opinion of the court.

The instructions given by the court below present the only matter necessary for this court to notice. The demand of the plaintiff was upon an account for \$259 90. The answer of

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the defendant denies the account, and also pleads the statute of limitations.

The court gave several instructions for the plaintiff, among which is the following, numbered as the third on the record : "If the jury believe that money was advanced by Michael Klamp, to pay the expenses of Rodewalt from Europe to the United States, and that the items of this account accrued in that way, they will find for the plaintiff as to the items proven to have been advanced in that way." Now this instruction has no regard to the defence set up, of the statute ; it is not correct, and the facts of the case did not warrant it.

The court gave for defendant an instruction which is also numbered third on the record, being the only one given for him on his motion. This instruction is as follows : "If the jury find that the plaintiff offered to pay and did pay the expenses of the defendant and family from Europe to the United States, as an inducement to the defendant and family to come with the plaintiff, and that the defendant's wife is the daughter of the plaintiff, then the transaction must be regarded as a gift or advancement from the plaintiff to the defendant, and he cannot recover for the same." The court also gave an instruction of its own motion, which is as follows : "The jury must find that the payment made by the plaintiff for the defendant was intended and understood as a gift, made as an advancement to the defendant to remove to the United States, and unless they so find, the defendant is liable therefor, and the jury will find a verdict accordingly."

1. Neither of these last two instructions do away with the effect of the first one cited above. These last two may have been designed to present a different view of the same subject, that is, the advancement, yet, when we take the whole of these instructions together, they present but a confused idea of the law. These instructions are calculated to mislead the jury, and indeed, they may have seriously affected the rights of the defendant.

For these instructions, therefore, the judgment below must be reversed, and the cause remanded. The other judges concur.

Morse v. Maddox.

MORSE, Appellant, vs. MADDOX, Respondent.

1. Judgment reversed because the court instructed the jury that there was no evidence on a given point, when the record showed otherwise.

Appeal from Jefferson Circuit Court.

C. Jones, for appellant.

M. Frissell, for respondent.

RYLAND, Judge, delivered the opinion of the court.

This case was before this court at the March term, 1853; was then reversed and remanded, (17 Mo. Rep. 569.) and now comes here by reason of an instruction given by the court, which caused the plaintiff to take a nonsuit. This instruction informed the jury that the plaintiff had given *no evidence* showing that Maddox had done any act to obstruct or hinder Morse from the use of the water for driving or turning a wheel to drive the saddle-tree manufactory, and the jury will find for the defendant.

1. This manner of instructing is objectionable, and it is always erroneous, if there be *any evidence* on the given point. It has been sanctioned, where there was no evidence, but even there, the court had better hypothetically instruct. In looking into the record in this case, we are satisfied that the instruction is not warranted by the state of the evidence before the jury, and it was error for the court to have given it. It was in evidence that there was, at all times, plenty of water in Big river to drive Maddox' grist-mill and Morse's saddle-tree factory; that the head gate that let the water through the flume or forebay, on to Morse's saddle-tree factory, was shut down in July, 1850; that it excluded the water from said factory and threw it on the grist-mill. Maddox had been heard to say, previously to shutting down the gate, that he intended to drive Morse away from the mill. This gate was shut down by the

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agent of Maddox, and was known to Maddox. The defendant's attorney contends that, as the gate could be easily raised, if it had been shut down by Maddox, that the shutting down did not obstruct the plaintiff in getting the water from the mill. I cannot see how this is to vary the state of the evidence before the jury. Was there any evidence as to the matter on which the instruction was given? If so, no matter how inconclusive or unsatisfactory, the court had no right to say that there was none. This manner of instructing is the source of frequent complaint in this court, and it can always be avoided by the courts below giving the instructions hypothetically. For giving the instruction, in this case, the judgment will be reversed, and the cause remanded, the other judges concurring.

ROBERT *et al.*, Respondents, *vs.* WALSH *et al.*, Appellants.

1. The possession of a specific portion of a tract of land by one party, will not aid another party, claiming a different portion of the same tract under the same grantor, in establishing an adverse possession of twenty years against the rightful owner.

Appeal from Jefferson Circuit Court.

M. Frissell, for appellants.

C. C. Whittelsey, for respondents.

SCOTT, Judge, delivered the opinion of the court.

This was a proceeding in partition, and the defendants in possession relied on the defence of twenty years adverse possession in themselves and those under whom they claim. A. Chouteau owned three undivided fourths of a tract of land containing 6002½ acres, and had a color of title to the remaining fourth. In 1820 and 1826, respectively, he made deeds for small portions of this tract of land, which tracts were desig-

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nated by metes and bounds. The tracts thus conveyed had been cultivated and possessed ever since. In 1837, the remaining portion of the tract was sold under proceedings in partition among the heirs of Chouteau, and the defendants claimed the land in controversy through a conveyance made in that procedure.

1. As the occupants under the deeds of 1820 and 1826 claimed by metes and bounds, and had no right, and did not pretend to exercise any acts of ownership over the rest of the tract, no principle is perceived, on which the defendants can derive any assistance from their occupation, in establishing an adverse possession in themselves and those under whom they claim. The other judges concurring, the judgment will be affirmed.

HALBERT, Respondent, vs. HALBERT *et al.*, Appellants.

1. A bequest of a slave to a widow does not, under the tenth section of the act concerning dower, bar her dower in real estate.

Appeal from Crawford Circuit Court.

C. Jones, for appellants.

M. Frissell, for respondent.

GAMBLE, Judge, delivered the opinion of the court.

Petition for dower in land and slaves. The husband died, leaving his widow but no children. He made a will with a single clause, giving to the plaintiff, his widow, a female slave, saying nothing about her right in his other property, and making no disposition of any other property. The defendants answered, setting up the bequest of the slave as a bar to dower. The court disregarded the answer, and gave judgment for the plaintiff for dower in one half of the land. The fact is found by the court, that the widow elected to be endowed under the

third section of the act concerning dower; which gives her one half of the real estate, subject to the payment of debts. The only question is, whether the answer sets up any bar to the petition.

1. The tenth section of the act concerning dower makes a devise of real estate to the wife a bar to her dower in the lands of the husband, unless she relinquishes the provisions made for her in the will, in the mode directed in the eleventh section. The bequest of the slave does not, either under this section or any other law, bar her dower in the real estate, and as it is found by the court that she made the necessary election to entitle her to dower, under the third section, the judgment is affirmed, with the concurrence of the other judges.

VALLE *et al.*, Appellants, *vs.* FLEMING *et al.*, Respondents.

1. An administration sale is void, when it appears affirmatively that the publication of notice, required by statute, previous to the order, could not have been made.
2. An administration sale, not approved by the court, is void; and the approval must appear from the record, although it need not be in express terms.
3. Where an administration sale, which the record shows to have been made for the payment of debts under the eighth section of article three of the act concerning executors and administrators (R. C. 1835,) is void for want of notice, it cannot be sustained on the ground that it might have been made under the second and third sections of the same article, which required no notice.
4. If an administration sale is void, it will not be rendered valid against the heirs, by the fact that they receive the benefit of the proceeds, especially when they are minors.
5. The fact that, after the death of one of two administrators, letters of administration are granted to the survivor and another, without any express revocation of the former letters, will not avoid a sale made by the last administrators.

Appeal from Madison Circuit Court.

This was an action by six of the seven heirs of C. C. Valle, to recover an undivided interest in the Mine La Motte tract of land. The record showed the following facts:

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In 1838, C. C. Valle died, owning an undivided one third of the said tract. Lewis F. Linn and E. F. Pratte owned the other two thirds. On the 19th of December, 1838, letters of administration on Valle's estate were granted to B. St. Gemme and E. F. Pratte. On the 21st of the same month, at a special term, the administrators presented to the county court a petition, stating that the personal estate of the deceased was insufficient to pay his debts, and that his interest in the Mine La Motte tract was subject to a mortgage, which would fall due in the February following. The petition stated that there was filed with it a statement of the real and personal property of the deceased, and of his indebtedness; but the only lists which appear upon the record are lists of the debts due to and from the estate. In justification of their haste, the administrators stated in their petition, that they had consulted with the friends and relatives of the deceased, who advised them to make the application. They prayed for an order authorizing them to sell, at private or public sale, the whole or so much of the said real estate as would pay the debts of the deceased. On the same day, the court made an order, reciting that a petition had been presented, accompanied by a true account of the administration, of the debts due to and by the deceased, and of the real and personal estate and other assets, and authorizing the administrators to sell, at private sale, the whole or so much of the real estate as should be necessary to pay the debts, provided the same be not sold for less than three-fourths of its appraised value. The entire tract was appraised at \$100,000. The administrators sold one half of the interest of C. C. Valle, or one-sixth of the whole tract, to Fleming, Lamb and Chauncey, of Philadelphia, for the sum of \$16,666 $\frac{2}{3}$. (Pratte and Linn, the other owners, sold one half of their respective interests at the same time to the same parties.) No report of this sale appears upon the record of the proceedings, nor is there any entry showing that the sale was approved by the county court. On the 24th of April, 1839, Pratte and St. Gemme, as administrators, and Pratte and Linn, as owners, joined in deeds con-

veying to each of the three purchasers, one undivided sixth of the entire tract. This deed was in the form of an ordinary warranty deed, recited the order of sale of Valle's interest, dated December 21, 1838, but contained no recitals of the proceedings under the order. Pratte and Linn warranted the title for themselves, and Pratte and St. Gemme warranted it as administrators of C. C. Valle.

At the May term, 1843, of the county court, the administrators presented another petition, reciting that, pursuant to the order of December 21, 1838, they had sold at private sale the one equal undivided half of the interest of C. C. Valle in the Mine La Motte tract, for the sum of \$16,666 66, upon a credit of ——— months, to some gentlemen of Philadelphia. They stated the necessity for a sale of his remaining interest, and prayed for an order. This petition does not appear ever to have been acted upon.

Before this time, two decrees had been rendered in suits commenced by Robert T. Brown and Francis Valle respectively, against the widow, administrators and minor heirs of C. C. Valle, by which the title to three fifty-sixths of the Mine La Motte tract was vested in the said Brown and Francis Valle, and it was also decreed that the administrators should account to Brown and F. Valle for the one half of their respective interests, which had been sold by the administrators with their assent, under the order of December 21, 1838.

On the 19th of January, 1844, St. Gemme having died, new letters of administration on the estate of C. C. Valle were granted to Melanie Valle and E. F. Pratte, the latter being one of the former administrators. There was no express revocation of Pratte's former letters.

On the 18th of September, 1847, the administrator and administratrix presented another petition, reciting that they had formerly sold an equal undivided one-sixth of the Mine La Motte tract, which sale had been reported to the court, and that the proceeds had been insufficient to pay the debts of the estate. They prayed for an order for the sale of their intestate's re-

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maining interest in the tract, being one-sixth, less three fifty-sixths. At the November term, 1847, after publication of notice, an order of sale was made, according to the prayer of the petition. A sale was made under this order to Thomas Fleming, which was approved. On the 10th of February, 1848, the administrators executed a deed to Thomas Fleming, by which, after reciting the order of sale and the proceedings thereunder, they conveyed to him "all the interest which the said C. C. Valle had in the Mine La Motte tract, at the time of his death, less three fifty sixths." The deed previously recited that Valle's interest was one sixth, less three fifty-sixths. The defendants claimed under these two administration sales, and the court declared the law in their favor. The plaintiffs appealed.

Noell and *Frissell*, for appellants. The first sale is void, because there was no publication of notice previous to the order. 9 Cranch, 64. 2 Comstock, 118. 3 Comstock, 103. 7 Hill, 431. 9 Cowen, 26. 12 Wend. 473. 3 Barb. 341. 7 Barb. 39. 5 Haywood, 394. 12 Ohio, 271. 8 Metcalf, 355. 9 Shepley (Me.) Rep. 321. 13 Shepley, 226. 6 N. Hampshire, 370. 6 Howard (Miss.) Rep. 106, 269. 1 Smedes & Marsh. 351. 2 Smedes & Marsh. 326. 6 Smedes & Marsh. 259. 7 Smedes & Marsh. 449. 9 Mo. Rep. 362. 16 Mo. Rep. 437. 12 Mo. Rep. 63. 9 Mo. Rep. 785. 12 Mo. Rep. 178. 1 Hill (N. Y.) 130. The order of publication cannot be presumed, when it is not shown by the record. 11 Howard (U. S.) 360. No presumption can be indulged in that the law has been complied with, as was done in the case of *Grignon's lessee v. Astor*, 2 Howard, because it here appears affirmatively that it could not have been complied with. The order of sale was made two days after the grant of letters. If it be said that the plaintiffs cannot take advantage of the irregularity in a collateral proceeding, it is replied that the very matter of which they complain is, that they had no opportunity to contest the matter in the county court, or to appeal, and no writ of error lies in such cases. R. C.

1835, p. 63, §2. Ib. p. 518, §2. 9 Mo. Rep. 362. The case of *Overton v. Johnson*, 17 Mo. Rep. is not in point. There, the question whether the want of notice would avoid the sale is expressly reserved. Another objection to the first sale is, that there was no report or confirmation, which renders it void under the statute. R. C. 1835, p. 53, §20, 21, 22. 2 Smedes & Marsh. 326. The deeds of the administrators are inoperative to convey any interest of the deceased in the land, as they purport only to convey the interest of the administrators, with covenants for title. 6 Connecticut, 258, 373. As to the second sale, it is void, because the letters of administration granted to Melanie Valle and E. F. Pratte were void, the first letters to Pratte and St. Gemme remaining in full force. *Post v. Caulk*, 3 Mo. Rep. 12 Mo. Rep. 63.

T. T. Gantt and *R. M. Field*, for respondents. 1. The county court having jurisdiction of the subject matter, the want of an order of publication previous to the order of sale is not a defect which can be taken advantage of in a collateral proceeding. *Overton v. Johnson*, 17 Mo. Rep. 442. *Frye v. Kimball*, 16 Mo. Rep. 9. *Snyder v. Markel*, 8 Watts, 416. *Grignon's lessee v. Astor*, 2 Howard's (U. S.) Rep. 319. 4 Wend. 436. 11 S. & R. 429. 2. The proceedings under the order of sale were approved by the county court at the May term, 1843, as shown by the record. 3. This sale was under section 3 of article 3 of the administration act of 1835, and there was no necessity for an order of publication, report or confirmation. 4. The second sale was, in all respects, regular, and the court ordered the execution of a deed, conveying *all the right, title and interest* which the decedent had in the Mine La Motte tract, at the time of his death. This order is broad enough to cover the interest attempted to be conveyed by the first sale, if that sale was void. 5. A part of the money arising from the sale under the order of 1838, was applied to the payment of the amounts decreed to Brown and Valle in the chancery suits, to which plaintiffs were parties, in exoneration of that part of the estate remaining unsold. This was a

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waiver on the part of the heirs of any irregularity in the proceedings. 2 Sand. Ch. Rep. 341.

SCOTT, Judge, delivered the opinion of the court.

The validity of the proceedings which resulted in the sale of the land in controversy has been placed on two grounds; the first of which is, that the sale was valid under the 8th and the following sections of the 3d article of the act respecting executors and administrators of the Revised Code of 1835, which authorized a sale of the lands of a deceased person to pay his debts, when there was an insufficiency of personal estate. The second ground was put on the 2d and 3d sections of the same article, which prescribed that, when any person should die, after having purchased any real estate, and should not have completed the payment, should it be believed that, after the payment of debts, there would not be sufficient assets to pay for such real estate, the executor or administrator should, by order of the county court, sell all the right, title and interest of the deceased therein.

1. An objection to the sale, when its legality is based on the first ground stated, is, that the requisite notice was not given to those interested to come in and show cause why the sale should not be made. The law required that the application should be made at one term for the sale, and that six weeks' notice of it should be given by publication in a newspaper. At the next term after such notice, upon proof of the publication of it, the court was required to hear the testimony, and dispose of the application. It is contended that this notice is not necessary to give validity to the proceedings; that the court having jurisdiction of the subject, the failure to give notice does not render its order of sale void; that the presumption of notice arises from the fact of the order having been made, and at most, an omission to give it would only affect the proceedings with error, which would not avoid a sale under them. It is certainly true, that the county courts have no other jurisdiction than that which is specially conferred on them by statute.

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They have no common law jurisdiction, nor can they be said to be courts of general jurisdiction, in whose favor, by the common law, the liberal intendments are indulged, which are extended to courts of that character. But the great mischief which, experience has shown, arises from avoiding sales made under the authority of tribunals having jurisdiction of the subject, have induced courts to extend an enlarged liberality of construction to proceedings instituted for such purpose, with a view to uphold them. As to these proceedings, the presumption extended to courts of general jurisdiction is indulged. No case is more frequently cited, in connection with this subject, than that of *Grignon v. Astor*, 2 Howard, 319. There, the Supreme Court of the United States went a great way to uphold judicial sales of real estate. Those proceedings were under a statute resembling ours. Notice of the application for the sale of the real estate by an administrator was required by law. It did not appear that the notice had been given. The opinion says, after the court has passed on the representation of the administrator, the law presumes it was accompanied by the certificate of the judge of probate, as that was requisite to the action of the court. The order of sale is evidence of that or any fact which was necessary to give the power to make it, and the same remark applies to the order to give notice to the parties. In the case before the court, the record shows that it was impossible that the notice required by law could have been given. The order of sale was made but two days after the letters of administration were granted. The court, at the term at which the sale was ordered, could not, by law, act on the matter; a sale could only have been directed at a term subsequent to the application for it. How, then, can a notice be presumed, when the record shows, on its face, that it was impossible, in the nature of things, that it could have been given? There is great difficulty in maintaining that a party is bound by an irregular proceeding, because he did not appeal from it, when the very objection is, that he had no notice, which would have enabled him to be present to take his appeal, and the ap-

peal by law could have been only taken at the term during which the order of sale was made. There is no writ of error allowed in such cases. The case of *Snyder v. Markel*, 8 Watts, 416, which is relied on by the defendants, and was also used as an authority in the case of *Grignon v. Astor*, above cited, maintains that the regularity of the proceedings for an administrator's sale of land of his intestate, cannot be impeached collaterally; that the remedy is an appeal for the correction of errors in them. How could there have been an appeal in such a case as the present? *Smith v. Rice*, 11 Mass. 507. This is an infirmity attached to these proceedings, which is apparent upon the face of the record, and no length of time can cure it. If the antiquity of the proceedings were such, (and it is not,) as to warrant the application of the maxim *ex diuturnitate temporis omnia praesumuntur rite et solenniter esse acta*, yet it could have no place here, as the defect in the proceedings is apparent on the record. In the case of *Grignon v. Astor*, it did not appear but that the notice was given, and as the proceedings had transpired a great length of time before they were assailed, the maxim above cited might have exerted an influence in its determination. But unfortunately, this case is so circumstanced as to be beyond its operation. If we admit that the purchaser is not bound to look behind the order of sale, under which he derives his title, yet the order here shows that it was made at a term at which no possible state of circumstances would authorize it, in the absence of those interested. The order of sale immediately follows the presentation of the application, when the statute required that it should be made at the next succeeding term of the court, after proof of the publication of six weeks' notice of the application in a newspaper.

2. Another objection to the validity of the proceedings is, that they want the approval of the court. The statute required that, at the next term of the county court after a sale, the administrator should make a full report of his proceedings, and enacted that, if such report of the administrator be not appro-

ved by the court, his proceedings should be void, and the court should order a new sale; if the report be approved by the court, such sale should be valid, and the administrator, upon the payment of the purchase money, should make to the purchaser a deed, conveying all the right, title and interest which the deceased had in the real estate sold. This objection is not affected by the principle, that a fair purchaser at a sale shall not be affected by any subsequent irregularity of the officer conducting it, as there could be no valid sale until there was a report and confirmation of it. In looking over the cases on administration sales of real estate, a provision like that above cited has not been found. It must have been intended to have some effect. So far as the court was concerned, the approval would seem to be the crowning act of the sale. That approval could only appear by the record, as it is an act of the court. It is not maintained that it should be *in totidem verbis*, but the sanction of the court to the proceedings should, in some way, appear; otherwise, the sole condition on which the law imparts any validity to them is not complied with. An order directing the administrator to make to the purchaser a deed, would be an implied sanction of his proceedings. The recital of the facts in a subsequent application for the sale of the real estate, which was never acted upon, that the land was sold for \$16,666 $\frac{2}{3}$, on a credit, whose duration is not mentioned, to persons not named, whose notes, for the purchase money, were disposed of at a discount not disclosed, and promises a full report thereafter, on no rule or principle can be regarded as any evidence of an approval by the court of the first sale. This application was moreover not made until 1843, upwards of four years from the date of the deed. If an approval after the sale will avail any thing, and one four years thereafter is effectual, no reason is perceived why the sale might not be ratified by an approval at this time. The law evidently contemplates that the deed should not be given, until there is an approval of the report of the proceedings of the administrator. A failure to enter the order of approval might be remedied by an amend-

ment of the record or by mandamus. Nor does the application for the sale of land on the 18th September, 1847, furnish any evidence that the first sale was approved. That application states that a report of the first sale had been made, but it nowhere appears, but as stated in the application made in 1843. The deed itself furnishes no evidence of the approval of the proceedings of the administrators by the county court. That deed is not in conformity to the statute, such as the court was required by law to direct the administrators to make. It did not convey to the purchaser all the right, title and interest which the deceased had in the real estate, but the administrators, as such, convey the land itself, just as the other joint owners conveyed it, joining in a deed with them, and as administrators, they warrant the title. The case requires no expression of opinion as to this deed, otherwise than as affording no evidence that the court approved the sale, as the deed is not such a one as the court was directed to order to be made to the purchaser. We do not say that, if there had been a report and a deed, in conformity to law, following it, that the approval of the court might have been presumed, on the maxim *probatis extremis præsumuntur media*. The approval of the court should have been a matter of record, and it should have been shown by the record.

3. It is impossible, from an examination of this transcript, to say that the sale is valid, on the second ground on which its validity is attempted to be upheld, stated in a preceding part of this opinion. If an order of sale, under the sections referred to, had been contemplated, it would have been for the sale of all the right, title and interest of the deceased in the tract of land purchased, whereas, the order was for the sale of the whole or so much of the real estate as shall be necessary to pay the debts of the deceased. Had the sale been under these sections, no appraisement would have been required, nor would there have been any necessity for a petition; yet we find both of these among the papers in the cause. It is not pretended that, had the sale taken place under these sections, that

the appraisement or petition would have affected its validity. The petition was not so worded as to accomplish any such result as was designed by these sections, nor does the deed itself show that such a purpose was intended. The act that was done by the court could only have been performed under the 8th and following sections of the 3d article of the act, and the order made shows that the court never intended to act under the second and third sections. If a proceeding is had under one provision of law, and it turns out to be invalid, can it be upheld on the ground that it might have taken place under provisions which would avoid the objections taken to its validity? The argument cannot be that the second and third sections upheld the proceeding, but that it might have taken place under them, for it is obvious that the end contemplated by these sections was not accomplished by the proceeding which did occur.

It is a matter of regret that purchasers should lose their estates, by reason of irregularities in the proceedings of those entrusted with the execution of the law. This sale bears intrinsic evidence of its fairness. Not the least blame can be imputed to the purchaser. He has been deceived by relying on the opinion of those, who, though incompetent to advise, yet were, no doubt, conscientious in the views they expressed. These considerations cannot affect the law of the case. To uphold this sale, would repeal every restriction which the law has imposed with a view to prevent unnecessary sales of the real estate of deceased persons. It is obvious that no validity can be imparted to this sale, by reason of any of the proceedings in the suits by R. T. Brown and others against the plaintiffs; the fact that they were minors, even if any thing was therein contained to affect them, would prevent such a consequence.

4. There was no irregularity affecting the last sale sufficient to invalidate it. The first administration either continued or it was replaced by the second. If it continued, the association of the name of Melanie Valle with that of the real administrator, who, it is assumed, was alone competent to act, would

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not prejudice the proceedings. If the second grant of letters was valid, the sale was equally good.

Judge Ryland concurring, the judgment is reversed, and the cause remanded; Judge Gamble not sitting.

LOGAN'S ADMINISTRATORS, Appellants, vs. LOGAN'S EXECUTORS, Respondents.

1. Under a marriage contract which reserved to the wife the ownership of her personal property, free from liability for the debts of her husband, with power to dispose of the same by will or otherwise, during the marriage, it was held that the wife retained an absolute estate.

Appeal from Perry Circuit Court.

This was an action to recover possession of certain slaves, which the plaintiffs claimed as administrators of John Logan, and the defendants, as executors of Rosannah W. Logan. The petition stated that John Logan became the owner of the slaves by virtue of his intermarriage with the said Rosannah W., subject to the provisions of a marriage contract annexed to the petition, by which the said Rosannah was entitled to a life estate in the slaves, with power to dispose of the same during the marriage, by will or otherwise. This marriage contract is set out at large in the report of the case of *Logan v. Phillips*, 18 Mo. Rep. 22. It was alleged that the said Rosannah W. did not dispose of the slaves during the marriage, by will or otherwise, and that the plaintiffs, as the personal representatives of John Logan, who was then dead, became entitled to the possession on the 1st of March, 1853. A demand was alleged. A demurrer to this petition was sustained, and the plaintiffs appealed.

M. Frissell, for appellants. The marital rights of John Logan attached to the slaves sued for, subject only to the right of the wife to dispose of the same, by will or otherwise, during

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the existence of the marriage. 12 Mo. Rep. 5. The case of *Logan v. Phillips*, 18 Mo. Rep. merely decides that the marriage contract barred Mrs. Logan's dower, but the quantity of interest she held in the slaves was not passed upon.

J. W. Noell, for respondents. In the case of *Logan v. Phillips*, 18 Mo. Rep., this court decided that the marriage contract vested the absolute property in the slaves in Mrs. Logan, and considered in that light, was a competent provision in equity to bar her dower.

SCOTT, Judge, delivered the opinion of the court.

This was an action under the present practice act to recover possession of personal property. There was a demurrer to the petition, which was sustained by the court below.

1. The demurrer was rightly sustained. From the terms of the agreement, we are persuaded it was designed to secure to the parties respectively their own property absolutely. This is the declared intent, expressed in the beginning of the contract, as a right of general disposition, unlimited in duration, carries with it a general right of property. The limitation of the power of disposition afterwards, to the time during the marriage, was properly conceived in the idea, that such a power could only exist by contract during coverture, as after the dissolution of the marriage, the power would exist independently of any contract. Also, it should not be overlooked that the contract exempts the wife's property from the disposal or payment of the debts of the husband absolutely. The power of disposition of the husband during the marriage, had been taken away by the clause giving the right to the wife. The subsequent restriction, therefore, was designed to be absolute and should be so construed. This case is different from that of *Ruby v. Barnett*, 12 Mo. Rep., in the circumstance that, in the case referred to, there was an express estate for life given to the wife. Here, it is conceived that there was a general property in her. This case turns purely on the construction of the agreement.

The other judges concurring, the judgment will be affirmed.

Polk's Adm'r v. Allen.

POLK'S ADMINISTRATOR, Respondent, vs. ALLEN, Appellant.

1. In an action for the conversion of a slave, the measure of damages is the value with interest. The plaintiff cannot recover the value of the hire by way of damages.
2. A gift or bequest of a chattel to husband and wife vests the entire property in the husband.
3. The statute of limitations only commences running against an administrator from the date of his letters.
4. If a slave is gratuitously left with a party, no damages are recoverable until a demand.

Appeal from Mississippi Circuit Court.

Action to recover damages for the conversion of a slave. The defendant answered that he held the slave as administrator of Mary T. Griffin. The court who tried the cause, sitting as a jury, found that Polk, the plaintiff's intestate, died in 1838, and bequeathed the slave to Samuel Y. Griffin and Mary T., his wife, by his last will; that the slave was by Polk, before his death, placed in the possession of Griffin, and remained in Griffin's possession until he died, and afterwards in the possession of his wife until she died, in 1848, when the slave was taken into possession by the defendant, as her administrator; and that letters of administration on Polk's estate were granted in 1850. A demand for the slave was also found. Upon these facts, the court below declared that the plaintiff was entitled to recover the slave, together with his hire, and gave judgment accordingly, from which the defendant appealed. A motion was made in this court to strike out the bill of exceptions, because it was not signed until the next term after the cause was tried.

Glover & Richardson, for appellant. 1. The evidence showed a gift to Griffin by Polk during his life-time. 2. If, however, there was no such gift, the plaintiff could not recover, because the possession of Griffin and his claim of title having commenced before Polk's death, the statute of limitations commenced running, and was not stopped by his death. 3.

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The court erred in giving judgment for the hire from the date of plaintiff's letters, when the evidence did not show the date of the demand.

T. Polk, for respondent. 1. A legatee cannot take possession of a legacy without the consent of the administrator, and if he does so, the administrator may maintain trover or trespass. Williams on Executors, side paging, 844-5, 1175-6-7-8, 1187, and authorities there cited. 1 Sand. Rep. 279, d 5. 2. The statute of limitations did not begin to run against the plaintiff until the date of his letters.

SCOTT, Judge, delivered the opinion of the court.

This is an action for the recovery of damages for taking a slave. Judgment was given for the return of the slave, and damages equivalent to his hire from the time the plaintiff took out letters of administration on the estate of his intestate.

1. It is clear that the judgment of the court is not warranted by the pleading in the case. Such a judgment as was rendered could only have been given on a procedure in pursuance to the provisions of the 8th article of the present practice act. As the plaintiff went for damages for the conversion of the property, he was only entitled to interest on the assessed value of the slave, and not to damages equivalent to his hire. The action was brought in a form which affirmed the act of the defendant in converting the slave. If he was converted, interest in the way of damages could only be given from the time of the conversion. The allowance of the hire, as damages, was permitting the plaintiff to blow hot and cold with one breath. The slave was converted and the slave was not converted. If the slave had died after action brought, the loss would clearly have been on the defendant. He would have been liable for the value, as the plaintiff had affirmed his act in taking him, and having affirmed it, he had no longer any right to his hire. R. C. 834, sec. 28.

2. Husband and wife cannot be joint tenants or tenants in

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common of a chattel. A gift or bequest to the husband and wife would vest the entire property in the husband. On the death of the husband, the property would go to his representatives, and the wife would only be entitled to her dower in it. Whatever may be the construction of the act concerning married women, passed 5th March, 1849, the gift or bequest of the slave here, was long prior to that time.

3. The statute of limitations did not run during the time there was no administration on the estate of Polk. It would only commence running from the grant of letters. *McDonald's Adm'r v. Walton*, 2 Mo. Rep. 43.

4. If the slave was gratuitously left with Griffin, no damages are recoverable until a demand was made for him. It will be seen that this judgment is reversed for errors beyond the reach of the bill of exceptions. Judge Ryland concurring, the judgment is reversed and the cause remanded.

 PERRY *et al.*, Respondents, vs. PERRYMAN *et al.*, Appellants.

1. Under the 13th section of the act concerning dower (R. C. 1845) a settlement, whether ante-nuptial or post-nuptial, to be a bar to dower, must be expressed on its face to be in discharge of dower.

Appeal from St. Louis Land Court.

M. Frissell, for appellants. The deed of April 8, 1835, was a good jointure, and is a bar to the widow's dower, under the last clause of the 12th section of the act concerning dower, (R. C. 1845.) It is in the very words of the statute, unless it is necessary that the words "for the jointure of the wife" should be inserted in the deed. In the absence of these words, or words of similar import, in the deed, it may be alleged in the pleading, and proved at the trial, that the estate was, and was intended as a jointure, and to bar dower, as was done in this case. *Vernon's case*, 4 Rep. 1. *Villars v. Beaumont*,

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2 Dyer, 146. Clancy on Rights, 212. The answer which was stricken out averred that Mrs. Perry had elected to take the provision by way of jointure. R. C. 1845, sec. 11. Any act which shows an intention to hold one estate in preference to the other, is an election.

C. D. Drake, (with whom *R. M. Field* was associated,) for respondents. Three questions arise. 1. As John Perry died childless, and his widow claims to be entitled to one half of his estate absolutely, is that one half to be regarded as *dower*? This involves the construction to be given to sections 3, 5 and 6 of the act concerning dower, (R. C. 1845.) It is contended that the provision made by section 3 is not *dower*, but is in the nature of a rule of descent. *Hinnershills v. Bernard's Executors*, 13 Penn. State Rep. 518. 2. Supposing the "provision" contained in said third section to be *dower*, what effect is to be given to the deed? This is to be determined by the act of 1825, concerning dower. Section 5 of that act is, in effect, and almost in words, a re-enactment of a portion of sec. 6 of ch. 10 of the act of 27 Henry VIII., which was the origin of the modern jointure, and has been the subject of repeated adjudications. There can be no doubt that our legislature used the word "jointure," in its established legal sense. *Vance v. Vance*, 21 Maine, 364. It is well settled, that no conveyance to or for the benefit of the wife shall operate as a jointure, to bar her dower in the other real estate of her husband, unless the estate limited to the wife be *expressed or averred* to be in satisfaction of her whole dower. And it must be so expressed in the instrument settling it, or it must appear by *necessary* implication from the contents of the instrument. 2 Blackstone, 137. 1 Greenleaf's Cruise, 216. 2 Flintoff on Real Prop. 197. 2 Crabb on Real Prop. §1220. 1 Stephens' Comm. 256. 1 Roper on Husb. and Wife, 465-6. 1 Hilliard on Real Prop. 187. *Pearson v. Pearson*, 1 Brown's Chan. Cases, 259. *Adsit v. Adsit*, 2 J. C. R. 448: 4 J. C. R. 9. *Gordon v. Stevens*, 2 Hill's Ch. Rep. 46. 3. In the absence of any thing in the terms of the deed, expressing

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or implying that it is made by way of jointure, can an intention that it should have that effect be established by parol evidence? Prior to the statute of Frauds and Perjuries (29 Charles II., ch. 3,) it was held in the affirmative in England, in two cases. But after the passage of that act, such evidence was held inadmissible, because it would have the effect of allowing a surrender of the wife's freehold title to dower, *by parol*, when the statute required such surrender to be in writing. 1 Roper on Husband and Wife, 466-7. *Tinney v. Tinney*, 3 Atkyns, 8. 1 Bright on Husb. and Wife, 442-3. This view applies with force under our statute, which endows a widow of the third part of her husband's lands, to which she shall not have relinquished her right of dower in the manner prescribed by law; that is, by deed, in which she shall join her husband, and acknowledge that she relinquishes her dower. See also *Swaine v. Perrine*, 5 J. C. R. 482, 490.

SCOTT, Judge, delivered the opinion of the court.

This is a suit for the partition of the real estate of John Perry, deceased, begun by the respondents, Eliza M. Perry and others, his widow and a portion of his heirs, against the appellants, John T. Perry and others, heirs, and the representatives of the interest of the heirs of the deceased. John Perry died on the 4th day of September, 1850, without children, leaving the plaintiff, Eliza M. Perry, his widow, who claims, as her dower in the real estate sought to be divided, one undivided half of it, absolutely.

The defendants, by way of answer to the claim of the plaintiff, Eliza M. Perry, for dower in the premises sought to be divided, set up the fact, that on the 8th day of April, 1835, John Perry, during his marriage with the plaintiff, his widow, settled on her, as a jointure, a lot in the city of St. Louis, worth \$1736, on which he afterwards expended upwards of \$12,000 in lasting improvements; that this settlement, at its date, was a reasonable share of the estate of the said Perry,

both real and personal, after deducting his debts ; that from the time the settlement was made, Eliza M. Perry held the lot for her separate use, and enjoyed the rents and profits thereof until the death of her husband, and since his death, has been in possession of the same, and during the year 1850, after the decease of John Perry, she directed the trustees, under the settlement, to convey the lot to her and her heirs, which was accordingly done, whereby it is alleged she elected to hold the said jointure in lieu of dower. The settlement alluded to was effected by a conveyance from J. B. C. Lucas to Jesse G. Lindell, Augustus Kerr and Beverly Allen, and to the survivors and survivor of them and his heirs, in trust for E. M. Perry, with directions to convey the said lot during the life of John Perry to such persons as she should by writing appoint ; and in the event of her surviving her husband, then the same was to be held for her use, and to be conveyed to her and her heirs, in such manner as the said E. M. Perry should advise. John Perry paid the consideration money to Lucas, who conveyed to the trustees above named at his request. The deed of settlement on its face did not express to be in discharge of the claim of dower in the estate of John Perry. The court below struck out an answer containing this defence to E. M. Perry's demand for dower, and entered judgment for the plaintiffs, from which the defendants appealed.

1. The only question presented by the pleadings is, whether the settlement made by John Perry, in April, 1835, on the plaintiff, his wife, was a jointure within the meaning of the 13th section of the act concerning dower, approved March 24, 1845. It cannot have escaped the observation of those who have examined the books of reports in reference to the general law of dower and jointure, that much litigation has arisen respecting settlements made on wives, from the difficulty of ascertaining whether they were intended as provisions in lieu of dower. Numerous cases are to be found on this subject. The statute of 27 Henry VIII., ch. 10, sec. 6, which first made jointures a satisfaction at law for the claim of dower, is silent as to the

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question whether the provision for the wife thereby authorized should be expressed to be for jointure, or, in other words, it does not require that it should be so expressed. Such being the statute, it was held by the English courts that, where the settlement, on its face, did not express that it was designed as a jointure, yet it might be so averred in pleading. *Vernon's case*, 4 Coke, 1. After the passage of the act of 29 Charles II., in restraint of frauds and perjuries, it became a matter of controversy in the courts, whether the principle above stated, allowing an averment to be made to show that a provision for the wife was intended as a jointure, was not overthrown. On this question, some were of one opinion and some of another. *Tinney v. Tinney*, 3 Atk. 8. Contra, Bac. tit. Dower and Jointure, G. 5. Under this state of things, our statute was enacted, which, unlike the act of 27 Henry VIII., required that the provision made for the wife, if designed to exclude her from dower, or to put her to an election, should be *expressed to be in full discharge of all her claim of dower*. We are warranted, then, in the conclusion, that our statute was worded as it is, in order to dry up this source of litigation. It is neither expressed in the deed of settlement, nor is there any thing contained in it, from which any implication arises that the provision thereby created was designed to exclude a claim for dower.

Independent of the consideration arising from the express language of the act concerning dower, authority is not wanted in support of the claim of the plaintiff, under the circumstances of this case, and as dower is favored in law, in a matter of doubt, the decision should be in favor of the widow. The fact that Perry was childless would always be regarded as a circumstance of much weight, in ascertaining the intent with which the provision was made for his wife. *Swaine v. Perrine*, 5 J. Chan. Rep. 488.

It has not been made a question whether a post-nuptial provision, like an ante-nuptial one, should be expressed to be in discharge of dower. There seems indeed, no ground on which

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this question could be raised, when it is considered that the deed of settlement was made in April, 1835, when the act of 1825, concerning dower, was in force. The words "as aforesaid," in the 6th section of the act of 1825, which corresponds with the 13th section of the act of 1845, make it plain that the jointure contemplated in the one section was the same as that in the other. We do not regard the omission of those words in the subsequent revisions, as designed to effect a change in the law. It is known that the revision of 1835 rejected many words which served to render a statute plain, as being superfluous and unnecessary. As the 12th section of the act of 1845, concerning dower, prescribes the requisites to a jointure, the following section, in using the word "jointure," must be presumed to use it in the sense in which it is contemplated in the preceding section.

The 10th section of the act concerning dower furnishes no rule by analogy which should affect this controversy. That section was introduced, with a view similar to that which dictated the 12th section. Its object was, to prevent all litigation respecting the question whether a devise by the husband to his wife, would be regarded as a satisfaction for dower, which had given rise to many suits. It would be against all principle, to make that section, the object of which was, the prevention of litigation, unsettle another provision, the aim of which was the same. There is nothing in the case of *Logan v. Phillips*, 18 Mo. Rep., which affects the question now before the court. There, the settlement was expressed to be in lieu of dower.

The other judges concurring, the judgment of the court below will be affirmed.

BROWN, Appellant, vs. WOOD, Respondent.

1. The contents of an instrument which is shown to be beyond the jurisdiction of the court may be proved by parol evidence.
2. A party cannot introduce evidence for the sole purpose of discrediting his own witness; but when he calls a witness to establish a fact, who disappoints him, he may prove the same fact by another witness, although in so doing, he may discredit the first witness.

Appeal from St. Louis Law Commissioner's Court.

C. C. Carroll, for appellant.

Blennerhassett & Shreve, for respondent.

SCOTT, Judge, delivered the opinion of the court.

Brown sued Wood for labor and materials, before a justice of the peace in attachment. The suit was commenced on the 2d December, 1852, and the account was dated 11th September, 1852. On an appeal being taken to the law commissioner's court, the account of the plaintiff was shown to be just, and it appeared that the labor had been done. A witness for the plaintiff, the brother of the defendant, testified that he had been acting for his brother, the defendant, since the first of January, 1853, under a power of attorney; that there was another power of attorney, dated about December, 1851, but he was informed that said paper was defective, and it was sent back to Wisconsin several months ago, and the new power, under which he was now acting, was substituted for it. The witness then stated that the services charged for by the plaintiff were rendered for the witness long before he had any power of attorney, of any kind, from the defendant; that he contracted for the services for himself, and that the defendant's name was never mentioned in connection with the contract. The defendant was sued as a non-resident of this state. The plaintiff, before the trial, had given notice to produce the defective power of attorney, spoken of above by the witness. This notice was served on the witness above mentioned, as the agent of the de-

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fendant. The paper was not produced on the trial, and the plaintiff, after the evidence above stated was given, offered to give parol evidence of the contents of said instrument, which was disallowed, and thereupon, he excepted and has brought the case here.

1. As it appears from the evidence that the paper was beyond the jurisdiction of the court, parol evidence was admissible, in order to show its contents. 3 Mon. 532. 9 Cow. 115. 7 Pick. 10.

2. The objection that the production of the paper would have discredited the witness, who was sworn for the plaintiff, cannot avail. A party cannot discredit his own witness, that is, he cannot introduce evidence whose sole purpose is to discredit his witness; but when he introduces a witness, in order to establish a fact, and that witness disappoints him, and fails to prove it, the party is not precluded from proving the fact by another witness, although, in so doing, he may show the first witness guilty of perjury. This witness was introduced to establish an agency on his part, for the defendant. Now, as he failed to do this, the fact may be proved by another witness, although the first witness will thereby be impliedly discredited.

The other judges concurring, the judgment will be reversed, and the cause remanded.

LUFT, Plaintiff in Error, *vs.* STEAMBOAT ENVOY, Defendant
in Error.

1. Where a suit is instituted against a boat, either before a justice or a court, it must appear from the demand filed that the same is a lien.

Error to St. Louis Law Commissioner's Court.

Action against a steamboat, commenced before a justice of the peace, and appealed to the law commissioner's court. The complaint filed with the justice, and verified by affidavit, was as follows:

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"Henry Luft complains that he has a demand against the steamboat Envoy, a boat used in navigating the waters of this state, amounting to one dollar and eighty cents, which demand accrued against the said steamboat, on account of the mate thereof, for services as laborer, within the thirty days next preceding the commencement of this suit, and is, in all its particulars, as follows, to-wit:

"Steamboat Envoy,

"To Henry Luft, Dr.

"To twelve hours labor, at fifteen cents per hour, \$1 80; and the said Henry Luft further states that he has now no other demand against said steamboat Envoy, which is a lien thereon."

A motion to dismiss on account of the insufficiency of the complaint was overruled, but after judgment for the plaintiff, a motion in arrest was sustained. The plaintiff sued out a writ of error.

Lewis & Henning, for plaintiff in error.

A. M. Gardner, for defendant in error.

GAMBLE, Judge, delivered the opinion of the court.

1. The act concerning boats and vessels makes certain classes of demands liens, and authorizes proceedings against boats for their collection. The first class comprehends demands "for wages due to hands or persons employed *on board the boat or vessel*, for work done or services performed *on board the same*."

When a suit is instituted against a boat upon a demand for labor, whether the suit be before a justice of the peace or before a court, it should appear by the demand, as filed, that the same is a lien which, under the statute, is to be enforced against the boat. In the present case, the plaintiff claims a small sum for labor performed, under an employment by the mate of the boat, but it does not appear that the labor was performed on board of the boat, nor, indeed, what the character of the service was. The defendant moved to dismiss the case, because

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the demand was not brought within the statute authorizing proceedings against the boat, but this motion was overruled. Afterwards, the law commissioner arrested the judgment, because of this defect in the statement of the plaintiff's demand. The motion to dismiss the case should have been sustained, because the demand of the plaintiff, as filed, did not appear to be one authorizing a suit against the boat, and although the motion in arrest of judgment is a novel motion in a suit commenced before a justice of the peace, yet it is at least as favorable to the plaintiff as the dismissal of his suit. If this court should reverse the judgment and remand the cause, with direction to dismiss it, no advantage would accrue to the plaintiff from such course. The judgment of the law commissioner will be affirmed.

STEWART *et al.*, Plaintiffs in Error, *vs.* ANDERSON *et al.*,
Defendants in Error.

1. Under the act of 1847, a garnishee is not entitled to an allowance for the fees of an attorney, but only for his own time and trouble in answering.

Error to St. Louis Court of Common Pleas.

Knox & Kellogg, for plaintiffs in error.

Todd & Krum, for defendants in error.

RYLAND, Judge, delivered the opinion of the court.

The question here arises on the clause in the act of the legislature of 1846 and '47, respecting garnishees in attachment or on execution, which declares, "If any plaintiff in attachment or in an execution shall cause any person to be summoned as garnishee, and shall fail to recover judgment against such garnishee, all the costs attending such garnishment shall be adjudged against such plaintiff, and the court or justice shall also render judgment in favor of such garnishee against the plaintiff for a

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sum sufficient to indemnify him for his time and trouble in attending and answering the interrogatories propounded to him."

Under this section, the defendants, Anderson and others, had been summoned as garnishees on execution in favor of Stewart and others against Bloomer & Holmes. They answered the interrogatories filed against them, which answer having been put in issue by the denial of the plaintiff, a trial of the issue was had, and the plaintiffs were nonsuited, or voluntarily abandoned the prosecution of the garnishment.

The garnishees then moved the court to allow them fifty dollars for their time and trouble in attending and answering the interrogatories propounded to them, and for the fees and services of an attorney at law, in preparing the answer and managing the matter.

The court heard the evidence of the reasonable worth of the lawyer's services in the business, and allowed the sum of fifty dollars, and gave judgment for that sum in favor of the garnishees and against the plaintiff, and for all costs. Exceptions were taken, and the case brought here by writ of error.

1. We have no hesitation in saying that, in our opinion, this act of the court was wrong. The statute never contemplated allowing to the garnishee the money or fees he might have to pay his attorney, in preparing the answer and defending the garnishment. The court is to allow the defendant or garnishee a sum sufficient to indemnify him *for his time and trouble in attending and answering the interrogatories*.

It is only by statute, that a judgment could be rendered against the plaintiff and in favor of the garnishee, and if the legislature had designed to pay for the attorney's fee in such matters, they would have expressly said so. The intention of the legislature was merely to provide some compensation to the garnishee for his attending and answering interrogatories, filed in a case where he was not indebted, or had none of the property or effects of the defendant in attachment in his hands. It was in some measure to prevent plaintiffs from over-hasty or inconsiderate action against garnishees. We do not feel war-

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ranted to extend the effect of this provision beyond the simple objects embraced in its terms ; a sufficiency to indemnify for the time and trouble in attending and answering. We consider the fee paid to the attorney not embraced in these matters, nor did the legislature design to embrace such fee.

Let the judgment be reversed, the other judges concurring.

LAWLESS, Appellant, *vs.* COLLIER'S EXECUTORS, Respondents.

1. The rule which limits the recovery, in an action upon the covenant of seizin, to a nominal sum, until there has been an actual eviction, does not apply where the title conveyed has entirely failed, and the grantee holds by an adverse title.
2. Where the grantee has purchased in the adverse title, the measure of damages is the amount paid.
3. But where the grantee assigns the covenants in the deed of his grantor, as a part of the consideration paid for the adverse paramount title, the assignee is entitled to the full amount of the purchase money, in an action upon the covenant of seizin.
4. A reconveyance is not necessary to a recovery of the entire purchase money, where the title has entirely failed.
5. As, under our statute, the occupant of land is only liable to the real owner for the rents and profits for the five years next preceding the commencement of suit for the possession, he might, it seems, in an action against his grantor upon the covenant of seizin, only be entitled to recover interest upon the purchase money for the same period, where his occupation had been beneficial.

Error to St. Louis Court of Common Pleas.

T. T. Gantt, (with *A. J. & P. B. Garesché*,) for plaintiff in error. The title conveyed by Collier having been entirely defeated, the measure of damages is the purchase money and interest. 10 Mo. Rep. 466. The title derived by Gamble from Collier being a nullity, he abandoned it, and purchases from the person holding the real title. But he obtains no facility for making this purchase from Collier's deeds to him. Suppose he had sued Collier on the covenants before buying

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the real title. Would not his rights, as against Collier, be just what they are now? Again, the title to the tract of forty acres was not quieted by the purchase from Lawless, but only by the location of this claim, so as to cover the tract. Who will measure or estimate the value of the services rendered in effecting this location? An eviction is not necessary, to entitle the plaintiff to more than nominal damages. Rawle on Covenants, 83, and cases there cited.

Haight & Shepley, for defendants in error. The amount paid by Gamble for the paramount title is all that could be recovered by Gamble, were he plaintiff, and his assignee stands in no better position. This is the measure of damages upon the covenant of seizin. *Spring v. Chase*, 22 Maine, 505. Rawle on Covenants, 92. Sedgwick on Damages, 175. Also upon the covenant of warranty. 8 Pick. 457. 11 N. Hamp. 87. Rawle on Covenants, 280. Also upon the covenant against incumbrances. 8 Pick. 550. 30 Maine, 398. 3 Cushing, 201. Rawle on Covenants, 131, 241. This rule has been recognized in this state. *Collier v. Gamble*, 10 Mo. Rep. 473. *Reese v. Smith*, 12 Mo. Rep. 344. The plaintiff cannot recover the whole consideration money and interest, because he is not in a condition to restore to Collier or his heirs the title conveyed by the deed to Gamble. *Catlin v. Hurlburt*, 3 Ves. 409. Rawle on Covenants, 83. 4 Dallas, 436, note.

SCOTT, Judge, delivered the opinion of the court.

On the 29th day of September, 1831, George Collier, for the sum of \$800, conveyed to H. R. Gamble, in fee, sixteen and a fraction acres of land, with a covenant that he was seized of an indefeasible estate therein. On the 8th of November, 1834, Collier conveyed to Gamble 24 91-100 acres of land for the sum of \$1,868, with a like covenant as in the first deed. These two tracts were contiguous and made one parcel, and on the 14th day of March, 1836, were conveyed by Gamble to

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Adam L. Mills, for the sum of twelve thousand dollars, by a deed, containing the covenants expressed by the words "grant, bargain and sell," and a general warranty. Afterwards, doubts began to be entertained about the validity of the title of Collier to the land conveyed to Gamble, and by Gamble to Mills, and Gamble, on the 16th day of March, 1842, purchased from Luke E. Lawless, who claimed under the heirs of Amos Stoddard, one undivided fifth of a tract of 350 arpens, which entirely covered the land conveyed by Collier to Gamble. In a conflict between the titles of Collier and the heirs of Stoddard, the latter prevailed, Collier claiming under a New Madrid location, and Stoddard's heirs under a concession by the Spanish government, confirmed by the act of congress, of July 4th, 1836. The consideration of the conveyance from Lawless to Gamble, was one thousand dollars and an assignment of the covenants contained in the deeds of Collier to Gamble, in trust for Virginia Lawless, the plaintiff, and wife of Luke E. Lawless. The title of Collier having been defeated by that of the heirs of Stoddard, Gamble, by means of the one-fifth part of the claim of the said heirs, which he had purchased from Lawless, was enabled to perfect the title to the land he had conveyed to Mills, and by suitable conveyances between all interested, Mills and those to whom he had conveyed, were made secure in the possession of the land they had purchased from Gamble. Neither Mills nor those claiming under him have been actually evicted, nor has Gamble been compelled to pay any damages, by reason of any covenants contained in his deed to Mills.

On this state of facts, Virginia Lawless, the beneficiary assignee of Gamble, institutes an action for a breach of the covenants of seizin contained in the deeds from Collier to Gamble, claiming damages to an amount equal to the purchase money received by Collier, with interest from the time of payment.

The defendant maintained that the plaintiff was only entitled to nominal damages.

The court directed the jury that the measure of damages was the sum paid by Gamble to Lawless for the interest he acquired in the claim of Stoddard's heirs, together with interest. There was a verdict accordingly.

1. As the title under which Collier held the land has been defeated, and as Mills and those claiming under him no longer hold by the title originally obtained from Gamble, but by means of the purchase made by Gamble from Lawless of an interest in an adverse title, the rule which limits the recovery, in an action on a covenant of seizin, to a nominal sum, until there has been an eviction, has no application under the circumstances of this case. Where the title conveyed has been defeated, and the grantee or his assigns hold by a title adverse to that acquired from their grantor, there can be no necessity for submitting to the form of an eviction, in order to be entitled to a recovery of full damages for a breach of the covenant of seizin. The reason of the rule, as laid down in the case of *Collier v. Gamble*, 10 Mo. Rep. 473, shows that it is inapplicable to the the circumstances of this case, as now presented. Rawle, speaking on this subject, says : " Cases may of course occur, in which, although the purchaser may have paid nothing to buy in the paramount title, and may still be in possession, yet, when the failure of title is so complete, and the loss so morally certain to happen, that a court might feel authorized in directing the jury to assess the damages by the consideration money." 83.

2. The weight of American authority has determined that the covenant for seizin is broken, if broken at all, so soon as it is made, and thereby, an immediate right of action accrues to him who has received it. But in such case, the grantee is not entitled, as a matter of course, to recover back the consideration money. The damages to be recovered are measured by the actual loss at that time sustained. If the purchaser has bought in the adverse right, the measure of his damages is the amount paid. If he has been actually deprived of the whole subject of his bargain or of a part of it, they are measured by

the whole consideration money in the one case, and a corresponding part of it in the other. Rawle, 44.

3. Under the peculiar circumstances of this case, what is the measure of damages? Can it be said that the purchase money paid by Gamble to Lawless is the just measure? Was it by the payment of the sum of \$1000 only, that Gamble was enabled to secure the title or possession of his vendee, and thereby prevent a recourse against him on his covenant. Such an assertion is not warranted by the facts. We cannot say that Lawless, in making a sale of his land, did not regard the covenants of Collier as worth the full sum which they were given to secure. He did not convey to Gamble the identical land that Gamble had conveyed to Mills. His conveyance of itself did operate but partially to secure Gamble, and thereby destroy his recourse against Collier for his purchase money. It was by the acts of Gamble, subsequent to Lawless' conveyance, that his vendee's title was perfected. What right had Gamble, then, to adopt a course of conduct which would have impaired the recourse of Lawless' trustee on the covenants which had been assigned to him for the benefit of Virginia Lawless. In so doing, he would have injured the plaintiff and have destroyed a part of the consideration he had given to Lawless for his interest in the Stoddard claim. Would not Gamble then have been liable to Virginia Lawless, for the destruction of the right which he had assigned for her benefit. This is the consequence flowing from holding that the \$1000 paid by Gamble to Lawless should be the measure of damages in this action. This would be unjust to Gamble. It would be placing him in the attitude of a wrong doer to the plaintiff, whilst performing an act dictated by considerations of justice to himself and to those to whom he was under obligations to indemnify. Is it not more just, that Collier should refund the money he has received from Gamble, the consideration of which has entirely failed, than that Gamble should be placed in the condition of enriching himself at the expense of another. No one can say that, without the assignment of the covenants in Collier's deeds,

Gamble ever would have been enabled to obtain Lawless' interest in the Stoddard claim. We know not how those covenants were estimated. No rule is known by which their value can be reduced below the sums they were given to secure.

4. It was maintained that, before there could be a recovery of the entire consideration money received by Collier, there should be a reconveyance of the title derived from him. The want of such a reconveyance is no bar to the action. This matter rests in the discretion of the court. Under the circumstances of this case, a court would impose no terms to prevent a recovery of the entire consideration money. A reconveyance here would be a nugatory act and totally unavailing for any purpose. Rawle, 84.

5. As to the question of interest, we are unable, from the state of the record, in relation to that matter, to express an opinion which should govern this case. Our law maintains that a valid contract may be made respecting a settlement on the public lands. A settler on the land of the government may have his action for the sum promised him in consideration of his yielding up his improvement. A vendor possessed of land in good faith, on a contract of sale, will frequently sustain considerable loss, and be subjected to great inconvenience, by giving up possession to his vendee. We can almost feel the injustice of telling that vendor, when he is sued for the purchase money he has received, that he shall pay interest, and yet be allowed nothing for the rents and profits the vendee has derived from the possession, for the reason that the vendor had no title, and his vendee is liable over to the true owner. We know that, nine times in ten, this liability over to the real owner is a mere bugbear. When improved lands are sold, the rent of the land and the interest of the money are supposed to counterpoise each other. The one is supposed to be an equivalent for the other. In this state, many invest their money in unimproved lands, relying on the increasing value of the land, as an equivalent for the interest of the money invested. Purchases may also be made, in which this latter inducement may be blended

with a desire to obtain land but partially improved. In case, therefore, of unimproved land, it would be unjust to say, in this state, as has been said elsewhere, that, whether the vendee turned his purchase to a profit or a loss, was no concern of the vendor, since, if a person purchase real estate, it is to be presumed that he does so because its rents will be equivalent to the interest of the money he may be content to pay for it.

These considerations show the difficulty of prescribing any fixed rule, in relation to the interest that is to be recovered in suits on covenants for seizin. When the possession obtained by the vendee, by reason of his purchase, has been beneficial, and he has not been, and it can be seen with certainty that he will not be liable over to the real owner for the rents and profits, it would be unjust to allow him full interest on the purchase money. Where the possession has not been beneficial, and it may be inferred that it was contemplated by the parties that it would not be so, justice requires that interest should be allowed from the time of the payment of the purchase money. Our statute regulating the action of ejectment, does not allow a recovery of the rents against an occupant, under any circumstances, for more than five years next preceding the commencement of the action. If the real owner is thus restrained in his recovery of the rents and profits against the occupant, no reason is seen why the recovery of interest should not be limited to the same period, in cases in which the possession has been beneficial.

These views are sustained by authority, and it is supposed that they will furnish a rule for the allowance of interest, when the facts of the case are disclosed. Rawle, 91, 94.

Judge Ryland concurring, the judgment will be reversed, and the cause remanded.

Judge Gamble did not sit in the cause.

Link v. Edmondson.

LINK AND WIFE, Appellants, vs. EDMONDSON, Respondent.

1. A. before his marriage, conveyed certain land to B., in fee, in trust to such use or uses, and to such person as A., in his life-time, should, by deed or will appoint, and in default of and until such appointment, to the use of A. and his heirs in fee. A., by his last will, devised all his real estate to his children by a former marriage. *Held*, A.'s widow was entitled to dower in the land first named, his will being regarded as a devise of his interest, and not as an execution of the power of appointment.

Appeal from St. Louis Circuit Court.

John R. Shepley, for appellant. I. The deed of the husband to Miron Leslie vested no title in Leslie, as the statute executed the use, and the title passed to Edmondson. *Cornish on Uses*, 21, 27. *Lewin on Trusts*, 102. See *Lorham v. Daniels*, 23 Vermont, 610. II. Whether the statute executed the use or not, yet, by our statute in relation to dower, the widow is endowed of the lands whereof the husband, or any person for his use, was seized of an estate of inheritance, at any time during marriage. *R. C. 1845*, p. 430, sec. 1 of act concerning dower. *Yeo v. Mercier*, 3 Harrison, 387. 1 B. Monroe, 88. III. But even if an estate did pass to Leslie, and the widow would not be dowable in the real estate, if the power of appointment had been exercised, yet the will of Edmondson does not operate as an appointment. 1. The fact that he owned other real estate, and that the devise is of *all his real estate*, shows clearly that he intended it as a devise, and not as an execution of the power of appointment. 2. Where it is doubtful whether an appointment or a devise is intended, the law will presume that it was the latter. *Lewin on Trusts*, 103. 2 Clancy on Powers, 71, 72.

T. T. Gantt, for respondent. 1. The deed executed on the 17th February, 1846, was a good creation of a power of appointment. 2. The will of B. B. Edmondson was a good execution of the power. 3. The appointment made by the will had relation to the execution of the deed, and defeated all in-

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intermediate incumbrances. Watkins on Conveyancing, p. 47, (18 Law Lib. 16.) 4 Kent's Comm. 325 *et seq.*

SCOTT, Judge, delivered the opinion of the court.

This is a suit for dower, begun by Nancy Link, formerly Nancy Edmondson, the wife of Benjamin B. Edmondson, who died seized of the lands in suit in St. Louis county.

Benjamin B. Edmondson, in 1846, prior to his marriage with the plaintiff, conveyed the lands in which dower is sought to be recovered, to Miron Leslie, his heirs and assigns, to have and to hold, in trust, to such use or uses and to such person as the said B. B. Edmondson, in his life-time, should, by deed or last will and testament appoint, and in default of, and until such appointment, to the use of the said Benjamin B. Edmondson and his heirs, in fee. On the back of this conveyance, Nancy Link, the plaintiff, made an acknowledgment in writing, that the same was made with her full knowledge and consent, and that its object and contents were fully understood by her. This was done prior to her marriage with Edmondson. B. B. Edmondson, by his last will and testament, devised all his real estate, in Missouri, to his children by a former wife. He had other real estate than that conveyed to Leslie, as above stated. In the will, no reference whatever is made to the power of appointment reserved to the testator, in the deed to Leslie.

On these facts, the question is, whether Nancy Link, formerly the wife of B. B. Edmondson, is entitled to dower.

1. It seems that the conveyancer, who prepared the deed to Leslie, adopted one of the modes practiced in England, in order to bar the widow of her dower. Watkins on Con. 47. It did not occur to him that, by the law of England, a wife could not be endowed of a trust or equitable estate at the time that device was adopted, (though it is not so now,) while, in Missouri, it is otherwise. All the authorities are clear to the point that the conveyance of the legal estate to Leslie, to such uses as the grantor should appoint, created in the mean time, an equitable estate in fee in the grantor. If a man, seized of

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lands in fee, make a feoffment to the use of such persons as he shall, by his will, appoint, by operation of law, the use vests in the feoffor, and he is seized of a qualified fee, till limitation is made of his power. *Clere's case*, 6 Coke. This is undoubted law. By our statute, a widow is dowable of all lands whereof another was seized, to the use of the husband during coverture. It is well settled that an ante-nuptial contract of the wife not to claim dower, is void. The claim to dower can only be barred in the mode pointed out by the statute regulating jointure. Can the husband, under our law, which gives dower in a trust estate, defeat a claim to dower by the contrivance employed in this instance? That the wife was informed of the conveyance to Leslie, only repels the imputation of fraud, and can impart no more validity to the act than if she was ignorant of it. The fact would only be of importance, in the event of an attempt to impeach the instrument as a fraud on her marital rights.

Without undertaking to settle the question proposed, we may safely place the determination of this case on the principle established by *Clere's case*, above cited, which is adhered to as law at this day. When a man makes a feoffment to such uses as he shall appoint, he has the use in the mean time. Thus, in the same estate, he has a power of appointment and an equitable interest. Now it is a rule of law that, "if an act will work two ways, the one by an interest, the other by an authority or power, and the act be indifferent, the law will attribute it to the interest and not to the authority; for *factio cedit veritati*." Hob. 159.

Now, in this instance, as Edmondson, the grantor, by his will, devises his real estate itself, as its owner, without any reference to his authority, it must pass by the will, for the testator had an estate devisable in him, and power also to limit an use; he had an election to pursue which of them he would, and when he devised the real estate itself, without any reference to his authority or power, he declared his intent to devise an estate, as owner of the land, by his will, and not to limit an use

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according to his authority. Thus this case so much resembles that of *Clere*, that it will be seen that the same language is applicable to each of them. *Clere's case*, 6 Coke. 4 Kent, 334-5. There being no execution of the power, the land passed by the will itself, and not by virtue of the execution of the power; consequently, there could be no relation back to the instrument creating it, so as to defeat the wife's right of dower.

The other judges concurring, the judgment will be reversed, and the cause remanded. •

RANKIN, Appellant, vs. CHARLESS, Respondent.

1. Under the code, a plaintiff is entitled to all the relief that he could formerly have obtained both from a court of law and equity upon the facts.
2. The mere fact that one proprietor, in building a house, inserts his joists in the wall of an adjoining proprietor, without license, will not authorize the interference of a court by injunction to remove the joists, although it is sufficient to entitle the party whose wall is thus used to recover damages. To obtain an injunction, he must show some special facts which entitle him to this extraordinary remedy.

Appeal from St. Louis Court of Common Pleas.

Civil action under the code. The plaintiff, in his petition, stated that he was the owner of a lot on the west side of Main street, in the city of St. Louis, upon which there was a four story brick building, the south wall of which was on the south line of the lot; that the defendant was the owner of an adjoining lot on the south, upon which he erected a building, the joists of which he inserted in plaintiff's south wall, without his consent, whereby plaintiff stated that his building was greatly weakened, and exposed to greater risk of injury and destruction by fire. He prayed judgment that the joists be removed, that the holes made in his wall by the insertion of the joists be filled with brick and mortar "as strongly as it may be done," and for damages for the use of his wall by the defendant, at the rate of \$200 per annum.

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The defendant answered, setting up a license.

There was a trial by a jury, who found the issue for the plaintiff, and assessed his damages at \$164, and the monthly value at two dollars. Upon this verdict, judgment was, on the 12th of March, entered up against the defendant for the damages and monthly value. Judgment was further entered that the ends of the joists inserted in the plaintiff's building, be removed, and the holes filled with brick and mortar, as strongly as it may be done, and that the plaintiff have execution accordingly. None of the evidence introduced at the trial is preserved in the record. A motion for a new trial was overruled on the 21st of March, the plaintiff remitting a portion of the damages. On the 29th of March, the defendant obtained leave to file a motion to set aside all that part of the judgment which related to the removal of the joists, and the filling up of the holes, which motion was afterwards sustained. The plaintiff excepted and appealed to this court.

B. B. Dayton and Barton Bates, for appellant. 1. The court below erred in granting leave to the defendant to move to set aside a part of the plaintiff's judgment, after the lapse of four days from its rendition. Act concerning Practice at Law, R. C. 1845, art. 7, p. 829. However erroneous the judgment may have been, it was not irregular, so as to give the defendant five years time within which to move to set the same aside. The new code does not prescribe the time within which the motion is to be made, but leaves it to the old statute concerning practice. New Code, art. 33, sec. 5. 2. The court erred in sustaining the defendant's motion. The portion of the judgment stricken out was necessary to restore the plaintiff to such possession and enjoyment of his property as he was entitled to. By the verdict of the jury, it was judicially ascertained that the plaintiff's wall was greatly weakened, and subjected to greater risk of injury and destruction by fire, by the unauthorized act of the defendant. It is manifest that no adequate compensation for the injury complained of can be given in damages. Even if there could be, still the plaintiff was enti-

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tled to the full possession and enjoyment of his property. Suppose Charless had built his wall upon the plaintiff's lot. Would it be said that the plaintiff would not have the right to be restored to the possession of his property, but would have to be content with the value of the ground, as long as the defendant might choose to use it? If it be said that the wall would belong to the plaintiff, yet he could not have it removed without the process of a court. This case can be sustained on the principle of an action of ejectment. But the plaintiff was entitled to the relief he asked on another principle. The thing complained of, is a continuing cause of annoyance and damage—a *nuisance*, within the established definition of the term, which it is within the power of the court to remove. 3 Blackstone's Comm. p. 216, 219 *et seq.* 2 Strange, 1167. 11 Mo. Rep. 518. The new code abolishes all distinctions between actions at law and suits in equity, and upon a statement of the facts which constitute his cause of action, the plaintiff is entitled, in the same action, to all the relief that could formerly have been given him by a court of law and equity upon those facts.

C. D. Drake, for respondent. The portion of the judgment which was stricken out was simply an injunction to remove a private nuisance. To authorize such an injunction, there must be such injury as, from its nature, is not susceptible of being adequately compensated by damages at law, or such as, from its continuance or permanent mischief, must occasion a constantly recurring grievance, which cannot be otherwise prevented, but by an injunction. 2 Story's Eq. 204. 16 Vesey, 338. 2 Eden on Injunctions, 259, note. Here, the plaintiff prayed for and obtained compensation for the defendant's use of the wall, thus showing that the injury was susceptible of being compensated by damages. The mere continuance of the joists in the plaintiff's wall is not a constantly recurring grievance, which can authorize an injunction. Nothing but the repetition of injurious acts can authorize an injunction on this ground. The motion was made in time. R. C. 1845, tit. Practice at Law, art. 7, sec. 8.

SCOTT, Judge, delivered the opinion of the court.

1. There is no evidence preserved in the record in support of the defence set up by the defendant. Consequently, no question can arise as to the right to continue the use of the wall of the plaintiff as a support for the joists of his building. The verdict establishes the fact, that the defendant has unlawfully made use of the building of the plaintiff, as a support to the joists of his house, and the only question that arises is, what remedy or judgment is warranted in law by the verdict of the jury? The present practice act having blended the jurisdiction of courts of law and equity, it would seem that the plaintiff is entitled, in this proceeding, to all the relief that would formerly have been afforded both by a court of law and equity.

2. According to the definition of a nuisance, which is said to be a wrongful act or neglect of one man, in the use or management of his land, which occasions damage to the possession or easement of his neighbor, or to a public easement, it may be questioned whether the injury complained of is a nuisance or not. Gibbon, 360. A purpresture is a species of nuisance, but that term is only applied to an encroachment on land belonging to the public. Coke, 177. But, although the act complained of may not be a technical nuisance, to be redressed by the remedies appropriated by law for that species of wrong, yet it is clearly an injury, entitling the party affected by it to an action for its redress.

The record in this case only presents the petition of the plaintiff, the answer of the defendant, and the verdict and judgment. The petition substantially alleges that the defendant, in building his house, used the wall of the plaintiff's house, (who was building simultaneously,) for a support to the joists of his building. The defence was, a license to use the wall. The verdict of the jury awarded damages to the plaintiff for the act complained of.

It seems that, in the opinion of the court below, an errone-

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ous judgment was entered on this verdict, and so much of it as decreed that the joists be removed from the wall, that the holes made by the insertion of the joists, be filled with brick and mortar, as strongly as it may be done, and that the plaintiff have execution against the defendant, in conformity to this judgment and decree, was stricken out, and it was thus left a judgment for the damages assessed.

Even if the injury complained of was a nuisance, yet it is well known that, in an action on the case, for such a wrong, no judgment for the abatement of it is given. That judgment was only proper in the old writ of assize of nuisance, and in a *quod permittat prosternere*. 3 Black. 219. But these ancient remedies have fallen into disuse, if they have not been abolished, and the action on the case, and the writ of injunction are now the usual remedies for a nuisance. But courts of equity do not, as a matter of course, interfere in all cases of this kind. That interposition can only be demanded to restrain irreparable mischief, or to suppress oppressive or interminable litigation, or to prevent a multiplicity of suits.

No injunction will be granted unless the act done or contemplated is, or will clearly be a nuisance. If a party sees a nuisance in progress, and does not interfere to prevent it, he will forfeit his right to assistance from a court of equity. *Jones v. Royal Canal Co.*, 2 Molloy, 319. *Williams v. Earl of Jersey*, 1 Craig & Phillips, 91. Gibbon on Nuisances, 403.

As the record is barren of all the circumstances attending this transaction, no reason is perceived why, if the extraordinary powers of a court of chancery are exerted in this case, they may not be in every complaint of a nuisance. It is allowable for a party to take the redress of wrongs of this character into his own hands. This was a case eminently proper for the exercise of such a right. Had the injury been redressed by the party at the moment it was done, the consequences would have been by no means so serious as they must be at this time, by granting the relief prayed. The injury has been

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done. It cannot now be prevented. It may be redressed. Whether it would be more equitable to let it remain, and leave the plaintiff to his remedy at law, we cannot say, as the facts necessary to a determination of that question are not before us. To tear down the house of the defendant now, might look more like revenge than the legal reparation of an injury. It is no part of the business of tribunals of justice to minister to the angry passions of men. If the defendant will wantonly persist in his encroachments on the rights of the plaintiff, it is in the power of the courts of law to award such damages as will arouse him to a sense of his continued injustice.

The other judges concurring, the judgment is affirmed.

MCLEAN, Respondent, vs. BOYLE *et al.*, Appellants.

1. Where a defendant, who is sued upon a foreign judgment, does not deny the judgment in his answer, but relies solely upon a set-off, he cannot object to the admission of the transcript in evidence on the ground that it is not properly authenticated.

Appeal from St. Louis Circuit Court.

Krum & Harding, for appellants.

M. N. McLean, for respondent.

RYLAND, Judge, delivered the opinion of the court.

This was an action upon the transcript of a judgment rendered against Boyle and another, by the Commercial Court of Cincinnati, Ohio. The defendant, Boyle, alone was served with process, and he appeared and filed his answer. In this answer, he sets up a set-off against the plaintiff's demand; does not deny the judgment of the Commercial Court of Cincinnati, Ohio, but places his defence alone upon the set-off against the plaintiff. Upon the trial, the plaintiff produced the transcript of the judgment on which he declared, and offered the same in

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evidence. The defendant objected to its admission, because it was not properly certified. The court below overruled his objection, and admitted the transcript of the judgment. The defendant excepted, and brings the case here by appeal.

1. The only point relied on by the appellant for the reversal of the judgment, is the admission of the transcript in evidence. This must avail him nothing, no matter how imperfect or defective the certificate of authentication of the transcript may be. The only matter in issue between these parties is the set-off. This was an admission of the plaintiff's demand, as contained in his petition. No proof was required on the part of the plaintiff. The burden of proof was on the defendant. He offered no evidence, and judgment was properly rendered below for the plaintiff.

The other judges concurring, the judgment is affirmed.

MENKINS, Respondent, vs. BLUMENTHAL, Appellant.

1. Where a deed describes the land conveyed by reference to a survey of a town, and only one survey is offered in evidence, the description in the deed must be taken, as a matter of law, to refer to that survey.
2. A plaintiff in ejectment cannot recover land not embraced by the description in the deed under which he claims, although his grantor, holding under a deed with a similar description, may have acquired title to it by possession or otherwise.

Appeal from St. Louis Court of Common Pleas.

The facts are sufficiently stated in the opinion of the court. The fifteenth instruction asked by the defendant, and refused by the court below, was as follows:

"Under and by virtue of the deed in evidence from Wilson Primm to plaintiff, the plaintiff acquired no title to any land lying south of the southern boundary line of the north-east and north-west quarters of block 53, in the town of Carondelet, as the same is designated and laid down on the plat of survey of said town."

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In lieu of this, the court instructed the jury to find for the defendant, if they believed that the survey offered in evidence was the same one referred to in the deed under which the plaintiff claimed.

There was a verdict and judgment for the plaintiff, from which the defendant appealed.

F. A. Dick, for appellant. The court erred in refusing the fifteenth instruction asked by the defendant, which told the jury what land was included in the deed to plaintiff. 17 Mass. 211. *Soulard v. Allen*, 18 Mo. Rep. *Mellon v. Hammond*, 17 Mo. Rep. 191.

C. C. Whittelsey, for respondent. 1. The plaintiff showed a confirmation by the act of 1812. 2. He showed a title by an adverse possession of fifty years of those under whom he claims. 3. The defendant was estopped by his own acts and those of his grantors, in establishing a boundary. *Taylor & Mason v. Zepp*, 14 Mo. Rep. 482. 16 Mo. Rep. 273. 4. The question, whether the land claimed is embraced in the plaintiff's deeds, was a question of fact for the jury, who have passed upon it. It depended upon the question, whether the survey of Eiler was the one referred to in the deeds or not.

GAMBLE, Judge, delivered the opinion of the court.

The plaintiff brought his action to recover possession of a piece of ground in Carondelet, describing it as being part of block No. 53. He showed a certificate from the recorder of land titles, issued under the act of 26th May, 1824, to Amable Guion's legal representatives, for a lot in block 53, the boundaries of which are given, and which include 160 feet 7½ inches on Church street, by 320 feet on E. street, bounded on the north by E. street, east by Church street, west by Third street, and south by the balance of the square. The plaintiff showed title under the heirs of Amable Guion, by a deed to Drake, and a deed for an undivided moiety from Drake to McDonald, proceedings in partition between McDonald's heirs and

Wilson Primm, who appears to have acquired the title of Drake to the other moiety, by which proceeding, the eastern half of the lot acquired by Drake was assigned to Primm, and the western half to McDonald's heirs. The deed to Drake from Guion's heirs describes the ground as "designated on the plat of survey of said town as the north-east and north-west quarters of block No. 53." The deed from Drake to McDonald, which conveys an undivided moiety, describes the ground in the same words. The proceedings in partition, which allot to Primm the north-east quarter of block No. 53, describe the whole land divided, in the same words used in the deed to Drake. The deed from Primm to the plaintiff conveys a lot containing one hundred and fifty feet square, French measure, bounded on the north by E. street, east by Second street, west by the heirs of James R. McDonald, and south by the balance of the square, being the same lot which was allotted to said Primm in the proceeding in partition, &c. Evidence was given to show that, while Primm owned the lot assigned to him in the partition, he and Josette Wilson, who owned the south-eastern quarter of the block now claimed by defendant, had agreed to a boundary between them, by which Primm's possession was extended over the part of the square now in controversy, which is seventy-four and a half feet on Second street, and is, altogether, south of the middle line of the block known as block No. 53. A survey of the town of Carondelet, made by Eiler, was given in evidence, and surveys, under the authority of the United States, of the confirmations in block 53. The defendant claimed under a certificate of confirmation, issued by the recorder of land titles, and a survey which gave the south-east quarter of the block to the representatives of Hunot. There was also in evidence a survey made in the cause, under an order of the court.

1. As there was but one survey of the town given in evidence, being that which was made by Eiler, previous to any conveyance made by Guion's representatives, and as no other survey of said town was alluded to in the evidence, the descrip-

tion of the property in the deeds to Drake, to McDonald and to the plaintiff, must be taken, as a matter of law, to refer to that survey, when using the words "as designated on the plat of survey of said town," &c., and if the north-east and north-west quarters of block No. 53, as designated on the plat of survey of the town, do not include the property in controversy, then the deeds using such description do not convey the title to it.

2. Now, upon this point, the evidence was all on one side, for there was no evidence given of any other survey than that made by Eiler, and the plat of his survey appears to have been filed in the recorder's office as the survey of the town. The United States surveys of the lots in block No. 53, appear also to correspond with this survey of Eiler, and the survey made in the cause which conformed to the surveys of Eiler and those of the lots made under the authority of the United States, shows that the property in controversy lies in the south-east quarter of the block, and that, consequently, it could not be included in the description given in the deeds under which the plaintiff claims. It may be true, that the ground in controversy was really cultivated and possessed by Amable Guion, so as to be confirmed to him by the act of 13th June, 1812, or it may be true that the boundary between Primm and Josette Wilson, under whom defendant claims title, may have been so established by the agreement of the parties and their subsequent occupancy, that the defendant may not be at liberty to dispute the title of Primm up to such boundary line, but upon neither supposition can the plaintiff recover under a deed that does not convey the property to him. If Amable Guion's original possession included the property in controversy, so that the title was confirmed by the act of 1812, the question still remains, do the deeds, under which the plaintiff claims title, bring that title down to him? If an agreement between Primm and Josette Wilson, in relation to their boundary, and their subsequent occupancy according to the agreement, estop her and those claiming under her, from denying the extent of Primm's lot, the question still remains, does the deed from Primm to

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the plaintiff convey the ground to the boundary so established, which includes a part of the south-east quarter of the block? Upon the evidence of the survey of the town before the jury, it is clear that the plaintiff could not, under the deeds, claim any part of the south-east quarter of the block in the occupation of the defendant, as that block was laid down upon the plat of survey of the town. The instruction, numbered fifteen, among the instructions of defendant, which were refused, should have been given. Several instructions upon the same point were given by the court, but they were more reduced and qualified than the law required they should be, where the evidence was such as was given in this case.

The judgment is, with the concurrence of the other judges, reversed, and the cause remanded.

WALES *et al.*, Respondents, *vs.* CHAMBLIN, Appellant.

1. In a suit upon a note, under the code, an answer, which denies any knowledge sufficient to form a belief as to whether the plaintiffs compose the firm to whose order the note was payable, is erroneously stricken out.

Appeal from St. Louis Court of Common Pleas.

E. Casselberry, for appellant.

Knox & Kellogg, for respondent.

SCOTT, Judge, delivered the opinion of the court.

This was an action on two promissory notes, payable to O. Wales & Sons, executed by the defendant. The plaintiffs were Oren Wales, Dexter Wales and Oliver H. Wales. The notes, it seems, were annexed to the petition, which stated that the plaintiffs are partners, under the name and style of O. Wales & Sons. The defendant, for answer, admitted that he executed the notes annexed to the petition of the plaintiffs, payable

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to the firm of O. Wales & Sons, but he did not know the names of the persons composing said firm, nor has he any knowledge thereof sufficient to form a belief, and required proof of all the averments and allegations in the petition, except such as were admitted. This answer was stricken out by the court below, and judgment was given for the plaintiffs as for want of an answer.

1. The fact, whether the plaintiffs constituted the firm of O. Wales & Sons, was a material one, as on the truth of its existence depended their right to maintain this suit. Under the first clause of the seventh section of the sixth article of the present practice act, the existence of this fact was properly put in issue, and the plaintiffs should have proved it. The issue being properly made, and the fact involved in it a material one, the court, on motion, had no right to indulge in any speculations, whether it was true or false; that was beside its province; its sole duty was to submit the issue to a jury for trial. Judge Ryland concurring, the judgment is reversed, and the cause remanded; Judge Gamble not sitting.

LEACH, Respondent, *vs.* GOODE, Appellant.

1. In the absence of any stipulation in a lease, the lessor is bound to pay taxes on the property, but not on improvements made by the lessee, which the latter is entitled to remove, or to be compensated for, at the expiration of the lease.

• *Appeal from St. Louis Circuit Court.*

This was an action to recover the value of certain improvements erected by Leach upon ground which he had held under a lease from Goode. By the terms of the lease, it was stipulated, that if, at its expiration, the parties could not agree as to the disposition of the improvements, there should be a valuation of the same, and Goode should pay Leach the amount of the valuation, provided it did not exceed two-thirds of the

original cost. The parties could not agree, and there was an appraisal in the manner pointed out by the lease. This suit was brought upon the award of the appraisers. The answer put in issue the allegation of the petition that the award did not exceed two-thirds of the original cost, and set up, as an off-set, the amount of certain taxes which the defendant had been compelled to pay upon the improvements, which he alleged to have been erected by the plaintiff while he held under a former lease. The lease contained no stipulation as to the taxes. The defendant's off-set was stricken out by the court below, and after a judgment for the plaintiff upon the remaining issue, the defendant appealed to this court.

Comfort & Manter, for appellant. A lessor is only bound to pay the taxes upon the land demised, and not upon the improvements of the tenant. Coote on Landlord and Tenant, 230. *Watson v. Home*, 182.

Knox & Kellogg, for respondent. No case can be found where the lessee, in the absence of any stipulation, has been compelled to pay the taxes on improvements which were upon the premises when the lease was executed.

GAMBLE, Judge, delivered the opinion of the court.

The only question is, whether Goode, as the landlord, was entitled to claim from Leach, the tenant, the amount of taxes assessed upon the improvements, which the answer alleges were erected by Leach, and were his property. The value of the improvements was claimed by Leach, and was the subject for which he brought this suit. The lease which contained the contract by Goode to pay for the improvements, appears by the answer to be a second lease for the same premises, as the answer alleges that, at and after its execution, Leach was the owner of the improvements upon the lot, which he had erected thereon, under a *former lease*. This second lease contained no stipulation about taxes.

1. When a lease is made, without any stipulation about taxes,

Wagemann v. Jordan.

the landlord is bound to pay the taxes upon the property ; but if the tenant, by the erection of buildings, which, by the terms of the lease, continue his property, and which he is either authorized to remove, or is entitled to be compensated for by the landlord, enhances the taxes, the landlord is not bound to pay the taxes upon the improvements. Here, the allegation of the answer is clear, that the improvements belonged to the tenant, and this very suit is brought to compel the landlord to pay for them under the stipulations of the second lease. In the proportion then that the improvements bore to the value of the whole property, as improved, the tenant should contribute to pay the taxes. Goode alleges that the taxes were assessed upon the ground and buildings together, and that he was obliged to pay the whole sum assessed, in order to discharge his property. In the opinion of the court, he was entitled to set-off such proportion of the amount thus paid, as the value of the improvements bore to the whole value of the property as improved. The judgment is reversed, and the cause remanded.

WAGEMANN, Respondent, vs. JORDAN, Appellant.

1. The supreme court will not review the discretion exercised by inferior courts in refusing to set aside a judgment by default, on account of the ignorance or mistake of the defendant in failing to file his answer.

Appeal from St. Louis Law Commissioner's Court.

Delafield & Kribben, for appellant.

Gardner, for respondent.

RYLAND, Judge, delivered the opinion of the court.

The plaintiff commenced his action in the law commissioner's court against the defendant, where he obtained judgment by default, the defendant failing to answer the plaintiff's petition. This judgment by default was entered on the 11th of

October, 1853, and an inquiry of damages was ordered for the 14th of the same month. On the 14th of October, the plaintiff appeared by his attorney, and waived a jury and submitted the cause to the court. The court, hearing the evidence, assessed the plaintiff's damages at the sum of one hundred dollars.

On the 21st of October, the defendant, by his attorney, moved the court to set aside the judgment by default, and grant him a new trial; in support of this motion, he filed his own affidavit, supported by the affidavit of his counsel. This motion the court overruled, the defendant excepted, and brings the case here by appeal.

1. The excuse for failing to file his answer to the plaintiff's petition, mainly rests upon the ignorance of the defendant as to the mode of proceeding in our courts. He states that, when sued, he employed an attorney to manage the case for him. This attorney drew up his answer and told him to "take it to the office, swear to it, and leave it there." The defendant thereupon took his answer to the office of Frederick Kretschmar, a justice of the peace, swore to it, and left it there with the justice, supposing that the office of said Kretschmar was the office alluded to by his attorney. We cannot properly estimate the excuse arising from the ignorance of the defendant, and we will not sit here to inquire how ignorant the defendant was of the mode of proceedings in our courts; whether he had been so short a time in our state, as to suppose the office of a justice of the peace was the only office where the answers to suits were to be sworn to and left or not. The constant rule of decisions in this court has been heretofore to leave such matters to the courts below, and we will not change this rule. *Weimer v. Morris*, 7 Mo. Rep. 6. *Green v. Goodloe*, 7 Mo. Rep. 27. *Field & Cathcart v. Watson*, 8 Mo. Rep. 686. *Heisterhagen v. Garland*, 10 Mo. Rep. 66. *Austin v. Nelson*, 11 Mo. Rep. 192. *Faber v. Bruner*, 13 Mo. Rep. 541. *Ib.* 590.

As to the point about the court assessing the damages upon

Weston v. Hunt.

inquiry, when the plaintiff waives a jury, see Code of Practice, 1849, art. 12, sec. 2. *Darrah & Pomeroy v. Steamboat Lightfoot*, 15 Mo. Rep. 187. The other judges concurring, the judgment below will be affirmed.

WESTON & RUSSELL, Respondents, *vs.* HUNT, Appellant.

1. Under the code, one partner is a competent witness for his co-partner, who is sued upon a demand against the firm.

Appeal from St. Louis Law Commissioner's Court.

H. N. Hart, for appellant.

L. M. Shreve, for respondents.

SCOTT, Judge, delivered the opinion of the court.

This case was tried in the law commissioner's court, on an appeal from a justice's court. Weston & Russell sued Hubbell & Hunt, partners, on an open account, for services rendered and materials furnished. Process was served on Hunt alone, and the suit carried on against him. On the trial, Hunt offered C. B. Hubbell as a witness for himself, but the court rejected him as incompetent. It appears that C. B. Hubbell was a partner in the firm of Hubbell & Hunt, at the time of the date of the items in the account on which suit was brought. The only question is, whether the witness was competent.

1. By the common law, the witness was clearly incompetent. The present practice act prescribes that no person offered as a witness shall be excluded by reason of his interest, but it excludes a party to the action, and every person for whose immediate benefit it is prosecuted or defended, so that it is not the quantum of interest which disqualifies, but the attitude of the person offered as a witness to the action. Now, if it can

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be said of this witness that this suit is defended for his immediate benefit, it is not perceived why the same thing may not be said of every witness who has an interest in the event of the action, and so the statute will be denied any force or effect. By the words, *person for whose immediate benefit a suit is brought or defended*, the statute intended one whose relation to the action is similar to that of him who, under the old system, prosecuted a note transferred to him without writing. He was compelled to sue in the name of him to whom the note was payable, though he would receive the benefit of the suit himself. He is intended, who has a right to control the suit, though it is not in his name. The close connection of these words to the words *party to the action*, shows what meaning was designed to be attached to them. Though not nominally, he must beneficially be the party to the suit. This is the character of persons designed to be excluded, and none other.

The other judges concurring, the judgment will be reversed, and the cause remanded.

HARPER'S ADMINISTRATOR, Plaintiff in Error, vs. THE PHOENIX
INSURANCE Co., Defendant in Error.

- ✓ 1. A life policy contained a condition, by which it was avoided if the assured should die in the known violation of a law of the state. *Held* that, under this clause, the policy would not be avoided, if the assured was killed after retreating from an altercation which he had commenced, under circumstances which would make the slayer guilty of felonious homicide.

Error to St. Louis Court of Common Pleas.

S. M. Breckenridge, (with whom Glover & Richardson were associated,) for plaintiff in error. The facts stated in the agreed case do not support the judgment. It clearly appears that Harper, when he was killed, had thrown away his pistol, and retreated from the combat. He was not then en-

gaged in the violation of any law. It is true that he held "a billet of wood over his head in a threatening position." But there was no attempt to execute the threat, and if there had been, Coryell was in a position which afforded him entire security. He could have had no such reasonable apprehension of danger, as justified him in taking life. It may be said that Harper's death occurred in consequence of his own act in commencing the quarrel, and he was therefore constructively violating the law at the time of his death. It is a settled rule in the construction of policies, that words used in them shall be taken most strongly against the insurer. It is submitted that this construction requires the defendant to show that Harper's death was the direct result of a violation of law—that he was acting in violation of law at the moment of his death, and not merely that his death was the remote result of some prior violation of law. Many deaths may, and doubtless do occur, which result remotely from some long prior violation of some one of our laws. For illustration, A. keeps an unlicensed dram-shop, which B. enters, and after drinking, becomes intoxicated, and without provocation kills A. Would such a case afford a good defence to a policy similar to the one in question? The fact that Coryell killed Harper under an apprehension of danger, although it might palliate his guilt or even justify him, in a prosecution against *him*, cannot avail the defendant in this action, if there was, in fact, no danger. If A. presents a gun, which he knows to be empty, and threatens to shoot B., who supposes the gun to be loaded, B. may be justifiable in killing A.; but A.'s act would hardly avoid a policy upon his life similar to the one under consideration. |

Barton Bates and *T. B. Hudson*, for defendant in error. The issue to be tried was, whether Harper died in the known violation of the law. The case agreed, it is submitted, shows that he did so die. Harper commenced the assault, and there having been no intermission in the conflict, he was still violating the law when he was killed. At the very moment he received the fatal shot, he was in the act of assaulting Coryell.

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It is fair to assume, that the breaches of law which should avoid the policy were intended to be such as enhanced the risk assumed by the company. If the violation of law did not, in any way, endanger life, it would hardly be considered within the meaning of the policy. But where, as in this case, the violation of law was such as tended directly and immediately to enhance the risk, it should certainly have the effect to avoid the policy, according to its express words. Harper's death was occasioned by his own assault upon Coryell, and it matters not what Coryell's guilt or innocence may be.

SCOTT, Judge, delivered the opinion of the court.

Edmund Harper, on the 17th of December, 1849, took from the Phoenix Insurance Company a policy of insurance on his life, for the term of five years, for three thousand dollars. The policy was subject to the following conditions: "That if the said Harper shall die in consequence of a duel, or by the hands of justice, or in the known violation of any law of this state, then, in such case, the policy shall be void."

This is an action on the policy by the plaintiff, Woodyard, who is the administrator of Harper.

The answer sets up the defence that Harper died in the known violation of a law of this state, in committing an assault upon one Coryell, whereby the policy was avoided; that Harper, just before his death, assaulted Coryell with a pistol, and attempted to shoot him, who, in resisting said attempt, and in defence of his life, shot and immediately killed Harper.

The trial of the cause was submitted to the court without a jury, and the facts were agreed as follows: [On the 6th day of February, 1850, and in the year, within the time for which the life of said Edmund Harper was insured, one Coryell was talking to a man named Wilson, standing about forty paces from B. Harper's store, where the said Edmund Harper, the deceased, then was. The deceased spoke to the said Wilson, and asked him if he knew to whom he was speaking, and admonished him

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to keep his hand on his pocket. Coryell then approached the deceased, and inquired if that insult was intended for him. The deceased replied that it was. The parties quarrelled, the deceased drew a pistol with a single barrel, and snapped it at Coryell, who, thereupon, drew a revolver and advanced upon the deceased, standing on the sill of B. Harper's store door, who threw his pistol, which had missed fire, and struck Coryell. The deceased then stepped into the store of B. Harper, and said Coryell, standing in the door of said store, with his revolver, shot at and missed said deceased, who was inside the store, and eight or ten feet from the door. The deceased then retreated precipitately behind an offset formed by a stairway, six or eight feet, and picked up a stick of wood, and raised it in a threatening position over his head, but did not advance upon said Coryell, nor attempt to use said stick in any other manner. Coryell then fired again with his revolver, and shot the deceased through his body, of which he died in a few minutes. The whole difficulty was one continuous quarrel.

Upon these facts, the court found for the defendant, whereupon the plaintiff sued out this writ of error.

1. In the construction of the contract which has given rise to this controversy, we are not authorized to be influenced by any considerations affecting the preservation of the peace and order of society, or of the morals of the party insured. Whilst the law will not countenance contracts against its policy, it does not look for a support to itself in the stipulations of men. In life policies, the insurer has a guaranty against increasing the risk insured, by that love of life which nature has implanted in every creature. In such policies, unless it is otherwise stipulated, the insurer takes the subject insured, with his flesh, blood and passions. The dangers to which the lives of men are exposed from sudden ebullitions of feeling, are a lawful matter of insurance.

When this cause was formerly here, the idea intended to be conveyed in the opinion given was, that a person could not be said to have died in the known violation of a law of this state,

when a crime attached to the individual by whom he was slain. It was not supposed that, therefore, it followed that, in all cases, when the killing was without crime, that the person slain died in the known violation of the law. We see no reason to change the opinion then hazarded. Although conditions in policies, similar to that now under consideration, are not unusual, we have not been enabled to find any case in which its interpretation has come up for adjudication. We must, then, as in all other cases involving the construction of contracts, look to the intent of the parties, as gathered from the instrument embodying their minds. It is obvious that, in giving the words of the condition a literal meaning, cases will be embraced, which no one will maintain were in the contemplation of the parties. If the person whose life is insured, uses offensive language to one, whilst they are engaged in an unlawful game of chance, which language is concerning the game, and he is shot down for the provocation, it would not be maintained that he died in the known violation of a law of the land, within the meaning of the contract. So, if he is riding a race in a public highway, which is forbidden, and his horse falls and he is thrown, and his neck broken, he does not die in the known violation of a law of the land, within the meaning of the terms of the condition. So, also, in a quarrel, if he assaults another with his open hand, and is thereupon instantly shot down, he does not die in the known violation of a law, within the intent of the policy. Many similar instances might be put, which, it is clear, were not within the meaning of the parties, and if they were, the contract would be much narrowed in its operation. If, then, the literal sense of the words of the policy leads to conclusions which are inadmissible, we are necessarily driven to some other mode, in order to ascertain the meaning of the parties. In the interpretation of contracts of insurance, the maxim *noscitur a sociis* obtains. When a clause stands with others, its sense may be gathered from those which immediately precede and follow it. The clause in the policy, which immediately goes before that under consideration, is, "if the party shall

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die by the hands of justice." Now do not these words clearly indicate the idea in the minds of the parties at the time? Do they not show that it was a justifiable killing? There are other modes of killing justifiable, than by the hands of justice. Dying by the hands of justice means dying by the execution of the sentence of the law. The fourth section of the second article of the act concerning crimes and punishments, enumerates many instances of justifiable homicide. These are, in resisting any attempt to murder, or to commit any felony on the person or in a dwelling house; in a lawful defence of a person, when there is reasonable cause to apprehend a design to commit a felony; when necessarily committed, in attempting, by lawful ways and means, to apprehend any person for any felony committed, or in lawfully suppressing any riot or insurrection, or in lawfully keeping or preserving the peace. Here are abundant instances in which the words of the condition can have play, without resorting to a latitude of construction, which so extends its sense as to embrace cases which were never in the contemplation of the parties. As there was but one mode of justifiable killing expressed, it was necessary to use general words to include all other modes of such killing, as they were equally within the meaning of the contract. The other clause in the condition is, that if the party shall die in consequence of a duel. If a man falls in a duel, his slayer is guilty of murder. A duel is a deliberate act, and the parties voluntarily, in violation of law, expose themselves to death. The kindred clauses of the condition thus show that a dying in consequence of a felony, then in the very act or course of being committed by the insured, and a dying in consequence of a felony previously committed by him, were in the contemplation of the parties. Now it would seem that, upon the acknowledged rule of construction, *noscitur a sociis*, that the last clause in the condition, being left in doubt as to its meaning, should be construed only to extend to instances in which the party died in the commission of a felony.

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It has been shown, that a literal interpretation of this clause would embrace cases not within the intention of the parties; now, the words of the condition are the words, not of the assured, but of the insurers, introduced by themselves, for the purpose of their own exemption and protection from liability; both in reason and justice therefore, no less than upon acknowledged principles of legal construction, they are to be taken most strongly against those that speak the words, and most favorably for the other party; for it is no more than just that, if the words are ambiguous, he whose meaning they are intended to express, and not the other party, should suffer by the ambiguity.] 5 M. & G.

The facts of this case clearly show that the person slaying Harper was guilty of a crime. There is no proof of the fact set up as a bar that Coryell slew Harper in self defence. Harper had abandoned the conflict, retreated as far as possible, and endeavored to screen himself from the attack of his assailant. (His having a stick of wood in his hand at the time he was slain, did not, in the least, extenuate the guilt of Coryell.) Under the circumstances, Harper would have been justified had he slain Coryell. This is made so by our statute. He would have been excused by the common law. If A., upon a sudden quarrel, assaults B. first, and upon B.'s returning the assault, A. really and *bona fide* flees, and being driven to the wall, turns again upon B. and kills him, this is *se defendendo*. 1 Hale, 480. Foster, 273. By the twelfth section of the second article of the act concerning crimes and punishments, it is enacted, that every person who shall unnecessarily kill another, either while resisting an attempt by such other person to commit any felony or do any other unlawful act, after such attempt shall have failed, shall be deemed guilty of manslaughter in the second degree. Now, if one dies under circumstances which would justify him in slaying his adversary, and when the person causing his death is, thereby, guilty of a felony, is it not a gross perversion of language

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to say, that that person died in the known violation of a law of the land? Judge Ryland concurring, the judgment will be reversed, and a judgment entered here on the facts found. Judge Gamble did not sit in this cause.

STIEBER AND WIFE, Respondents, vs. WENSEL, Appellant.

1. Under the new code, (art. 7, sec. 10,) in an action of libel or slander, a petition is sufficient, which states that the defamatory matter was published or spoken of the plaintiff, without stating any extrinsic facts for the purpose of showing its application.
2. Words which involve a charge of adultery are actionable by statute, without alleging special damage.

Appeal from St. Louis Law Commissioner's Court.

The petition alleged that the defendant spoke, in the German language, of and concerning the plaintiff, Mrs. Stieber, and another woman, false and slanderous words, which being translated were as follows: "Ye are whores; ye carry on roguery and are rogues; ye go to church and whore with the priests." The petition contained no other material averment, and stated no special damage. A demurrer was overruled, and after judgment for the plaintiff, the defendant moved in arrest of judgment, which motion being overruled, he appealed to this court.

DeLafield & Kribben, for appellant. 1. The words are not actionable in themselves and no special damage is alleged. They do not necessarily imply a charge of adultery against the plaintiff's wife, and if they do, this should have been alleged in the petition.

T. C. Reynolds & Garesché, for respondent.

GAMBLE, Judge, delivered the opinion of the court.

1. The tenth section of the seventh article of the code of practice provides: "That, in an action for libel or slander, it

Whitcomb v. Whitcomb's Adm'r.

shall not be necessary to state in the petition any extrinsic facts, for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally that the same was published or spoken *concerning the plaintiff*." The form of such petition, given in the code, corresponds with this provision. The petition, in the present case, is good under the code, as it alleges that the words were spoken of the plaintiff, Mrs. Stieber.

2. The words themselves involve a charge of adultery, and, under the act of the general assembly, (R. C. 1011,) are actionable, without alleging special damage. The judgment is affirmed.

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WHITCOMB, Plaintiff in Error, *vs.* WHITCOMB'S ADMINISTRATOR, Defendant in Error.

1. The entry, by a county or probate court, of the non-appearance of a party who has given notice of a demand against an estate, is not a judgment from which an appeal lies. The party must give a new notice.

Qu. Whether, in such case, the first notice would be an exhibition of the demand, within the meaning of the statute, so as to prevent a bar, or for the purpose of classification.

Error to St. Louis Circuit Court.

Barton Bates, for plaintiff in error.

C. B. Lord, Krum & Harding, and *M. L. Gray*, for defendant in error.

SCOTT, Judge, delivered the opinion of the court.

On the 2d of May, 1851, Willard Whitcomb gave notice of his demand against the estate of Luke Whitcomb, and that he would present it for allowance to the Probate Court of St. Louis county, at the next term thereof. This notice, it seems,

was served on an agent of the administrator. On the 23d day of September, 1852, the following entry was made in the Probate Court: "Sam'l Lowry, administrator of Luke Whitcomb, appears to answer the demand of Willard Whitcomb against the estate of the said deceased, filed in court on the 16th of June, 1851, and the said Willard Whitcomb, although called, comes not; it is therefore considered by the court, that said claimant take nothing by his said demand, and that said defendant go thereof without day." A motion, unaccompanied with any reason therefor, was afterwards made in the Probate Court, to set this nonsuit aside, which was overruled, and thereupon, Willard Whitcomb appealed to the Circuit Court, where, on motion, the appeal was dismissed, on the ground that there was no such judgment in the Probate Court as would warrant an appeal to the Circuit Court. From this order of dismissal an appeal was taken to this court.

1. We see no necessity for this appeal. The entry on the record of the Probate Court is nothing more than the statement of the fact that Whitcomb did not appear. Call it a nonsuit or any thing else, it amounts to nothing more. The Probate Court cannot affect its powers by the language with which its orders may be clothed. As it was true that the plaintiff did not appear, we do not see how he can complain. It is obvious that the law contemplates no appeal from such an entry as was made. As the plaintiff did not appear in court, in pursuance to his notice, and the adjournments under it, how could he expect the defendant to appear afterwards without another notification. He did not ask for another continuance of the cause, which had already been continued for upwards of fifteen months. From aught that appears, there was a voluntary abandonment of the proceeding which he had begun. When a Probate Court enters the fact of the non-appearance of a plaintiff, who has given notice, it does nothing affecting the plaintiff, more than he has already done himself. It simply records the fact that he did not appear, and, of course, there is an end of the matter, as there can be no pretence that it is the

duty of the court to continue the proceeding, as it is not desired, and as it might be attended with great expense.

These observations are based upon the case under consideration, by which it appears that the claim was filed in court at the term stated in the notice, and the cause was continued from time to time, we may presume, by consent, which would give the court jurisdiction. But, in the event the claimant giving notice, does not appear at the term at which he requires the administrator to be present to answer his demand, we do not see how the administrator could take any step affecting the claimant. What process or evidence would there be before the court, showing that the claimant had required the attendance of the administrator in court, until the production of the notice, authenticated by proof of service? Should the court, on the unauthenticated notice given to the administrator, take any cognizance of the cause in the absence of the claimant? Under such circumstances, would not the proceeding fall to the ground, leaving the claimant to another notice to the administrator to appear and answer his demand? If the administrator should appear with witnesses, and the claimant should fail to attend, there might be some difficulty about the costs. The claimant should be held liable for them, but we do not see on what principle the court would be warranted in entering a judgment for them, with nothing before it on which the judgment could be based.

We suppose the real question lies beneath this proceeding, which cannot, nor is it adapted to reach it. For entering the fact that the plaintiff did not appear, when, in reality, he did not do so, we see no reason why he should be allowed an appeal. He is in no worse condition by reason of the entry, than if it had not been made. In either event, the same remedy was open to him, which would be a new notice to the administrator to appear, and then the question would arise whether the first notice would be an exhibition of the demand, within the meaning of the statute. That question has not been made, and we express no opinion in relation to it.

James v. Steamboat Pawnee.

We do not wish to be understood, by any thing that has been said, as conveying the idea that, on a trial of a demand in the Probate Court, the plaintiff may not submit to a nonsuit or withdraw his claim, as circumstances may require. Judge Ryland concurring, the judgment will be affirmed; Judge Gamble not sitting.

JAMES, Respondent, *vs.* THE STEAMBOAT PAWNEE, Appellant.

1. Under the act concerning boats and vessels, (R. C. 1845,) a boat is not subject to a lien, on account of supplies furnished without the limits of the state. (Former decisions affirmed.)

Appeal from St. Louis Circuit Court.

This was a demand presented for allowance as a lien against the steamboat Pawnee, on account of coal furnished to said boat by the plaintiff, at Memphis, in the state of Tennessee. It appeared in evidence that the boat was engaged in the New Orleans and St. Louis trade, and was on one of her regular trips from New Orleans to St. Louis, when the coal was furnished. The demand was objected to, on the ground that it was not a lien, but was allowed by the court below, and placed in the second class. The defendant appealed.

Krum & Harding, for appellant. Our statute has no extra-territorial operation. *Fisk v. Steamboat Forest City*, 18 Mo. Rep. 587. 12 Mo. Rep. 414. *Ib.* 261. 10 Mo. Rep. 583, 586. 16 Ohio, 91, 178. The fact that the boat was on her way from New Orleans to St. Louis, in the performance of one of her regular trips, when the demand accrued, does not take this case out of the principle decided in the above cited cases.

Knox & Kellogg, for respondent. This case is distinguishable from the cases previously decided by this court. Here the boat was actually "used in navigating the waters of this

Childs v. Steamboat Brunette.

state," when the demand accrued, which was not the fact in either of the former cases. The Ohio statute, under which the decisions cited from that state were made, materially differs from ours.

RYLAND, Judge, delivered the opinion of the court.

This case comes fully within the principle settled by this court in the cases of *Noble v. Steamboat St. Anthony*, 12 Mo. Rep. 261, and *Twichell v. Steamboat Missouri*, ib. 412. These cases decide that the statute of this state, concerning boats and vessels, is limited in its provisions to contracts made *within the state* with boats used in navigating the waters of this state. These last decisions were made in accordance with the decision of this court in the case of the *Steamboat Raritan v. Pollard*, 10 Mo. 583. This point has been before this court since the *Raritan* case, three different times, including the case now before us.

This court adheres to the former decisions, and will adhere to them, until there shall be a change in the law concerning boats and vessels. Let the judgment be reversed, the other judges concurring.

CHILDS & CHILDS, Respondents, vs. THE STEAMBOAT BRUNETTE, Appellant.

1. A ship carpenter, who contracts to repair a boat and furnish materials, is not an *agent*, within the meaning of the act concerning boats and vessels, and cannot create a lien upon the boat in favor of a party from whom he purchases materials.

Appeal from St. Louis Circuit Court.

The facts sufficiently appear in the opinion of the court.

Hudson & Thomas, for appellant. The lumber furnished by the respondents was not furnished to any one of the per-

sons authorized by the statute to bind the boat. The statute is in derogation of the common law, and must be strictly construed.

T. Polk, for respondents. The question is, whether the ship carpenter was an agent of the boat, within the meaning of the act concerning boats and vessels. It is evident that the term "agent" is used to indicate some person different from the "master, owner, or consignee," as otherwise it is surplusage. Now, in the case of repairing a boat by a ship carpenter, under contract for the whole job, unless the contractor is an agent, within the meaning of the statute, no liability can be created against the boat, as a defendant, by any agent, nor indeed, by anybody but the owner or master, as there could be no consignee in such case. An owner who authorizes a ship builder to repair his boat, it would seem, authorizes him to incur all the liabilities that the statute imposes on a boat for materials furnished for repairs. In this case, the carpenter had possession of the boat under the contract for repairs, and the boat is liable for materials furnished, upon the principle decided in the case of *Steamboat Lehigh v. Knox*, 12 Mo. Rep. 508. See also the principle decided in the following cases: *Rowe & Vandeventer v. Saltmarsh*, 10 Mo. Rep. 38. 7 J. R. 311. 16 ib. 89. 1 Cowen, 290. 1 Dallas, 129. 7 T. R. 306.

RYLAND, Judge, delivered the opinion of the court.

The only question necessary to be determined in this case, involves the meaning of the term "agent," as used in our act concerning boats and vessels.

The statute makes every boat or vessel used in navigating the waters of this state liable and subject to a lien in the following cases. I omit the first class. Second. "For all debts contracted by the master, owner, agent or consignee of such boat or vessel, on account of stores or supplies furnished for the use thereof, or on account of labor done or materials fur-

nished by mechanics, tradesmen or others, in building, repairing, getting out, furnishing or equipping thereof." In this case, the owner of the boat made a contract with a ship carpenter to make certain repairs to his boat, for a certain stipulated sum of money; the ship carpenter contracting to furnish the materials as well as to do the labor. The ship carpenter purchased of the plaintiffs materials for the repairs, and performed the work and received the payment therefor. The plaintiffs demand the price of the lumber used by the ship carpenter, and which he had purchased from them, and used upon the boat in making the repairs, and file their claim as a lien against the boat.

The owner denies ever having purchased any materials for the boat from the plaintiffs; denies that plaintiffs furnished the materials mentioned in their complaint, at the instance or request of the master, owner, agent or consignee of said boat, or at the instance or request of any person authorized to act for and on behalf of said boat, and denies, positively, that McDonald, the ship carpenter, had any authority to purchase said lumber, as charged in the complaint, and denies that McDonald ever had any right or authority whatever to bind said boat. The evidence showed that McDonald, the ship carpenter, got the lumber, to repair the boat, from the plaintiffs.

The following instructions were asked by the defendant:

2. If the jury believe from the evidence, that McDonald agreed to do the work and furnish the materials for the repairs of the defendant, and that the lumber furnished by the plaintiffs to McDonald was used by him in doing the work and making the repairs which he had agreed with Willard to do and furnish, then the plaintiffs are not entitled to recover in this suit.

3. If the jury believe from the evidence, that McDonald agreed with Willard to repair the defendant, and furnish all the materials necessary for such repairs at his own expense, then the defendant is not liable in this case for any lumber furnished by the plaintiffs to make said repairs, unless furnished by the authority of Willard, the owner.

4. The defendant is not liable to the plaintiffs for the lumber sued for, unless the debt was contracted by either the master, owner, agent or consignee.

5. If the jury believe from the evidence, that McDonald was to do the work and furnish materials, as specified in contract marked "B," and offered in evidence, and that the lumber mentioned in the plaintiffs' account was furnished for said repairs by plaintiffs, without any authority given by the master, owner, agent or consignee of said boat, the jury ought to find for the defendant.

6. But if the lumber was furnished by the plaintiffs to McDonald, for repairing the boat, and was by him actually used in making such repairs, under contract with the owner, and with the knowledge or consent of the owner, the plaintiffs are entitled to recover the value thereof.

The court refused to give the second, third and fifth of the instructions asked, and the defendant excepted, and also excepted to the giving of the sixth instruction. The jury found for the plaintiffs. A motion to set aside the verdict and for a new trial, was made and overruled, exceptions taken, and the case brought here by appeal.

1. Can a ship carpenter, who has contracted to repair a boat, to furnish materials, and to do the labor for a certain and specific price, be considered an agent of such boat, under our boat and vessel act, so as to bind the boat by lien in favor of a lumber merchant, from whom such carpenter purchases the lumber? In the opinion of this court, such ship carpenter is not and cannot properly be considered such agent.

The term "agent," in the act of the legislature, giving the lien, is always used in company with terms of a certain and known nautical and maritime meaning. "Master, owner, agent or consignee;" "the owner, captain, agent, consignee;" "the captain, owner, agent or consignee." Whenever the word agent is used, we find the words captain or master, owner and consignee in the same sentence, thus limiting the meaning of the term agent, to a particular and circumscribed business

connected with the boat, and with maritime duties. It does not comprehend the broad and general signification of the term, as applied to a person who performs a duty or an act for another. The term agent, is understood by its associate terms, captain, owner, master, consignee ; it is known by its associates — *noscitur a sociis*.

In the construction, therefore, of this statute, we look to the meaning of the term agent, and assimilate the duties of such a person to the duties of the person known as ship's husband. He is to procure freights or charter parties, make contracts about passage fare, disburse and receive moneys for the boat. His acts for these purposes are considered to be the acts of all the partowners, who are liable on all contracts entered into by him for the conduct of their common concern, the employment of the ship. The tradesman, therefore, who agrees to furnish the ship with a certain quantity of coal, for a certain sum, cannot be considered the agent of the ship, or the ship's husband, so as to create a lien on the vessel in favor of the collier from whom he should happen to purchase the coal ; nor can we consider the carpenter, who agrees to repair for a certain sum, the agent of the boat ; nor the painter, who agrees to paint the boat, the agent of the boat, under this boat and vessel act. The term agent of the boat, is well known, and is as confined and limited in its meaning as, captain of the boat, owner of the boat, consignee of the boat. To extend the word agent, in order to embrace the ship carpenter, who is repairing for a specific sum, that he may create a lien on the boat, in favor of the lumber merchant, or extend the term agent, in order to embrace the painter, who agrees to repaint the boat for a specific price, and furnish the materials, in order that he may create a lien on the boat in favor of the druggist, who sells him his oil and paints, would be a perversion of all rules of construction, and would create as many agents for the boat, as there are different jobs of work to be done upon the boat, and all at the same time. This never was the intention of the law makers. This is not the proper construction of the

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act. We therefore consider that the court erred in refusing to give the instructions Nos. 2, 3 and 5, asked by defendant, and erred in giving the 6th instruction for the plaintiffs. The judgment is reversed, the other judges concurring.

HAMILTON, Appellant, vs. THE STEAMBOAT IRONTON, Respondent.

1. The affidavit to a complaint against a boat, under the act (R. C. 1845,) if made by the plaintiff's agent, must show the agent's means of knowledge. *Bridgeford v. Steamboat Elk*, 6 Mo. Rep. 356, affirmed.
2. A party does not waive his objection to a defective complaint by obtaining a continuance.

Appeal from St. Louis Law Commissioner's Court.

W. R. Biddlecome, for appellant. The respondent was too late with his objection to the complaint, after a trial in the justice's court without objection, and after continuances in the law commissioner's court. See 5 Cow. 15. 7 Cow. 366. 1 M. & S. 230. 2 Hill, 637. 3 Mo. Rep. 348. 5 Mo. Rep. 533. R. C. 1845, §13, §18, p. 670. The complaint was sufficient within the decision in 6 Mo. Rep. 356. The affiant states his means of knowledge, by stating that he is the agent of the owner.

H. N. Dedman, for respondent. 1. If Hamilton is the plaintiff in the suit, McLean makes the affidavit, without stating his means of knowledge. 6 Mo. Rep. 356. 2. McLean swears that he has a demand against the boat, not that Hamilton has. 3. McLean swears that he has no other demand against the boat which is a lien, not that Hamilton has none. R. C. 1845, §23, act concerning boats and vessels.

RYLAND, Judge, delivered the opinion of the court.

The complaint filed in this case presents the only question to be noticed by this court. The complaint is as follows :

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“Samuel McLean, agent for Wm. Hamilton, sole owner of the steamboat Kentucky, complains that he has a demand against the steamboat Ironton, a boat used in navigating the waters of this state, amounting to \$22 10, which demand accrued against the said steamboat on account of damages and injuries done the steamboat Kentucky, within the six months next preceding the commencement of this suit, and is, in all its particulars, as follows :

“Steamboat Ironton,

“Dr. to William Hamilton.

“To damages sustained by the said owner, by breaking the starboard guard of the steamboat Kentucky, by said steamboat Ironton, on the — June, 1853,

4½ days work, at \$3 per day,	-	-	-	\$13 50
Flat boat hire, 5 days, at \$1 per day,	-	-	-	5 00
Lumber for the same	-	-	-	2 40
Spikes, 12 penny,	-	-	-	1 20

\$22 10”

Total loss sustained by negligence of steamboat Ironton, \$22 10. Plaintiff asks judgment, and the said Samuel McLean, agent, further states that he has now no other demand against said steamboat Ironton, which is a lien thereon. Samuel McLean being sworn, on his oath says, that the facts set forth in the above complaint are true. Samuel McLean.”

1. This complaint and affidavit are not sufficient, and the court properly quashed the same. In the case of *Bridgeford et al., v. The Steamboat Elk*, it was held by this court that the affidavit required to be made to the complaint of the plaintiff, in a suit instituted under the boat and vessel law of 1835, (which act is similar to that of 1845, in this respect,) when not made by the plaintiff himself, should show what means the affiant had of knowing the truth of the particulars specified in the complaint. See 6 Mo. Rep. 356.

The affidavit here mentions no means of information by the affiant. Indeed, the complaint is so badly drawn, that it is

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hard to say who has the demand. It begins by stating that Samuel McLean has the demand; to be sure it describes him as agent of William Hamilton, but it does not say that Hamilton has the demand. Yet the account is against the Ironton, as Dr. to Wm. Hamilton, and said complaint ends by stating that said McLean, agent, states that he has now no other demand against said steamboat Ironton, which is a lien thereon.

When parties seek summary remedies, afforded by our statutes, in particular modes, let them be cautious and pursue the modes pointed out. It is too late, when they have travelled through all the courts, from the lowest to the highest, to ask us to construe their bungling proceedings in such a manner as will give them what they wish, in spite of their own words and acts. *Steamer Blue Ridge v. Steamer Time*, 9 Mo. Rep. 650.

2. This defect is not waived by the party getting a continuance of his case below. It is a material, substantive defect; one which would have proved fatal in arrest of judgment. We therefore think the court properly sustained the motion to dismiss the suit, and its judgment is affirmed, Judge Scott concurring; Judge Gamble not sitting.

TACKETT, Appellant, vs. HUESMAN, Respondent.

1. The statutory remedy for trespass on land does not supersede the common law remedy. So, a complaint before a justice, which would be insufficient under the statute, may yet be good for the common law action.

Appeal from St. Louis Law Commissioner's Court.

G. W. Cline, for appellant. This court has held that the statute giving double damages in cases of trespass, does not take from the party the old remedy, and he may pursue whichever he chooses. *Montague v. Papin*, 1 Mo. Rep. 544.

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Papin v. Kuell, 2 ib. 26. No written statement is required, when an action is commenced before a justice for a trespass. *Donahoe v. Campbell*, 4 Mo. Rep. 34. In trespass, all are principals. Those who assent to it, after it is done, are equally liable with those who committed it. 6 Mo. Rep. 175.

S. H. Gardner, for respondent. 1. The complaint shows that the trespass was committed by third parties, and not by the defendant. This is clearly intended for a complaint under the statute, and only lies against the party doing the act, and not for the acts of his agents or servants. 2. The complaint does not show the value of the property injured, destroyed or carried away. 3. Although it may not have been necessary for the party to file a statement, yet, having done so, he is bound by it.

RYLAND, Judge, delivered the opinion of the court.

Tackett commenced his action against Huesman for a trespass, alleged to have been committed by Huesman on land belonging to said Tackett. The complaint was filed before a justice of the peace in Central township, in St. Louis county, and is as follows :

“The state of Missouri, }
“County of St. Louis, } ss.

“Enoch Tackett vs. Louis Huesman.

“Enoch Tackett complains that one Louis Huesman committed, on or about the 25th day of March, 1853, a trespass upon land not his own, to-wit : On the premises of said Tackett, situated in St. Louis county and state of Missouri, by cutting down and carrying away wood, timber, &c., and splitting and putting up rails on the land and premises of said Tackett, said premises lying and being in St. Louis county and state of Missouri; and conveyed to the said Tackett by deed from William Hensley and Lydia Hensley, his wife, on the tenth day of August, 1837, and described in said deed as the south half of the north-west fractional quarter of section thirty, in township forty-five north, of range six east, in the

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district of lands subject to sale at St. Louis ; and that said Huesman had been regularly notified to cease to cut down any timber or wood of any kind, or to carry away any rails or other timber from the land and premises of said plaintiff, and that, in the face of said notice, he, the said Huesman, did take and carry away from the premises of plaintiff, fencing and rails, contrary to law, and that said Huesman still continues to trespass, as aforesaid, to the injury of the plaintiff, in trespass, to the amount of fifty dollars, for which he asks judgment ; and plaintiff further states, that all of said trespasses have been committed by the agents or hands, in the course of their employment, while in the service of said Huesman, by which the said Huesman becomes liable, in trespass, to the said Tackett, in the aforesaid sum of fifty dollars."

The justice issued his summons on this complaint against the defendant, who being served with the process, appeared and a trial was had between the parties, which resulted in a verdict for the plaintiff for ten dollars. An appeal was taken to the law commissioner's court, where, on the calling of the case, the parties announcing themselves ready for trial, the court, upon the defendant's motion, dismissed the suit. From this judgment of the law commissioner's court an appeal was taken, and the case is brought to this court.

1. In looking into the cause of complaint filed by the plaintiff, this court is satisfied it is sufficient, and that it was erroneous for the court below to dismiss this suit. It is not a proceeding under the statute for the recovery of damages to treble the value of the property injured ; but it is a sufficient statement of the cause of complaint for the trespasses alleged to have been committed by the defendant, in order for the plaintiff to have his common law action of trespass therefor. It is to be regretted, in this period of legal reform, when efforts are making every where to do away with nice technicalities in the statement of causes of action, that such motions as the one made in this case should be insisted upon in our inferior courts, and be sustained by them, instead of trying the merits of the

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action between the parties, and settling the dispute as soon as practicable, and with as little cost and delay as possible.

Let the judgment be reversed, and the cause remanded; the other judges concurring herein.

SKINNER, Appellant, vs. THOMPSON, Respondent.

1. The court trying an issue made by an interplea in an attachment suit must find the facts, as required by the code.

Appeal from St. Louis Law Commissioner's Court.

Skinner sued Vrowman by attachment. Thompson, claiming the property attached under a deed of trust from Vrowman to him to secure a note payable to Martin, filed an interplea. The issue thus made was tried by the court, without a jury, and there was a judgment for the claimant. The record contains no finding of the facts. The plaintiff in the attachment appeals to this court.

J. W. Skinner, for appellant.

Cline & Thompson, for respondent.

GAMBLE, Judge. The claim filed by Thompson to the property attached in the suit of *Skinner vs. Vrowman*, was to be proceeded in as any other action, in which the right of property was to be determined. The fifteenth section of article five of the code directs, in relation to suits commenced by attachment, "that the pleadings and procedure shall be, as near as may be, according to the provisions of this act." Here was a submission of the case upon the claim of the interpleader to the court sitting as a jury. In such case, the court should have been governed by the code, in finding the facts and pronouncing the law thereon. As this was not done, the judgment is reversed, with the concurrence of the other judges, and the cause remanded.

WOOD & WOOD, Respondents, *vs.* THE STEAMBOAT FLEET-
WOOD, Appellant.

1. An uncertified deposition may be read in evidence, after the death of the witness, upon the testimony of the officer that the deposition was regularly taken.
2. An allegation in a petition, not material to the plaintiff's right of action, is not admitted by a failure to deny it in the answer. Thus the value of an article for which a plaintiff seeks to recover is not admitted if not denied.
3. An inconsistent instruction is erroneous.

Appeal from St. Louis Court of Common Pleas.

This was an action against a boat for the non-performance of a contract of affreightment. The petition stated that the plaintiffs shipped on board of the boat, at Pittsburgh, 190 sacks of malt, which the master contracted to deliver to the consignees at St. Louis, for a freight of thirty cents a hundred; and that the master had failed to deliver the same, although the consignees had tendered the amount of the freight. The defendant answered that the freight agreed upon was forty cents a hundred, and that he only retained the malt because the consignees refused to pay this rate of freight. The answer contained no denial of the value of the malt. The deposition of William Wood was taken for the plaintiffs in Pittsburgh, and suppressed before the trial, because improperly certified. At the trial, the deposition of Parkinson, the officer who took the deposition of Wood, was read in evidence. He testified that he was an alderman and ex-officio justice of the peace, and that the deposition of Wood was taken at the office of the plaintiffs, on the 21st of June, 1851; that the deponent was sworn to testify the whole truth of his knowledge touching the matters in controversy in the cause, was examined and cross-examined, and that his deposition was reduced to writing in his (Parkinson's) presence, and subscribed by said Wood; and that Wood had since died. The plaintiffs were then permitted to read in evidence the deposition of Wood, the defendant ob-

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jecting. Wood testified that he was the plaintiffs' drayman, and delivered the malt on board of the boat, and received a dray ticket, which he produced, signed by the clerk of the boat, in which the freight was put down at thirty cents a hundred. At the close of the evidence, the court gave several instructions, the third of which asserted that the value of the malt, not being denied in the answer, was admitted to be as stated in the petition. The fourth instruction is set out in the opinion of the court. There was a verdict and judgment for the plaintiffs.

J. A. Kasson, for appellant. 1. The court erred in admitting the deposition of Wood, accompanied by that of Parkinson. 2 Yeates, 232 (note.) 2. The court erred in instructing that the answer admitted the value of the malt, which was not specifically alleged in the petition, but only by way of recital.

Leslie & Barrets, for respondent.

RYLAND, Judge, delivered the opinion of the court.

1. The point taken by the appellant, in regard to the admission of the deposition of Parkinson and Wood is, in the opinion of this court, not tenable. The deposition of Wood was suppressed before, because the certificate of the justice was not in accordance with the statute law. It was withdrawn, and the justice before whom it was taken, identifies it in his own deposition, properly taken and certified, stating the death of the deponent, Wood. It may be considered as a part of Parkinson's deposition; it was taken between the parties, properly, but it lacked the certificate. Now being a deposition of a witness in the same cause, between the same parties, good, so far as the facts are stated, good, so far as the witness himself is concerned, only lacking the formal certificate of a third person, we conceive the court below properly admitted it, after proof of the death of the witness. The cases cited from Yeates, do not bear out the views of the counsel. The board of property

was no court—had no power to administer the oath to a witness. In the case in the note, from all that appears, the deposition of the deceased witness, taken before the referees, may have been rejected upon the same ground. The referees, under the order, may not have had power to swear witnesses. See 2 Yeates, 232.

2. In regard to the instructions, in the opinion of this court, the court below erred in the third instruction. That instruction informs the jury that the answer of the defendant admits the value of the malt to be eight hundred and five dollars. This is obviously given under the new code of practice. In our opinion, the allegation, to be taken as admitted, must be a material one, and it must be so stated in the petition, as to bring to the mind of the defendant the importance of it in the trial of the cause; then, if the defendant fails to deny it in his answer, it may be taken as confessed; but here, the sum of eight hundred and five dollars, as the worth of the malt, was not a material matter to the action; the action could have been as well supported if the malt had been worth but four hundred dollars, or any other sum. Some value must be set forth, but that particular value, as set forth, need not be proved; a less or a greater value will, on proof, support the petition. The court, then, erred in this instruction.

3. The first instruction given by the court, of its own motion, marked number four on the record, is also erroneous; it is repugnant on its face. This instruction has two clauses. It is as follows: "The dray ticket, marked "A," in question, is not conclusive evidence that the rate of freight therein named was the stipulated rate agreed upon. But if the defendant has shown that it did not express the actual contract made, it does not bind the defendant; it is open to explanation. But if said dray ticket was signed by the authorized agent of the defendant, then the price of freight therein named is the contract price, and the defendant is bound thereby." It needs but to be carefully read, to see its repugnancy; the two clauses ex-

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pressing different and inconsistent views of the same matter. This instruction should not have been given. Its tendency was anything else than to instruct or assist the jury in forming a proper conclusion in the premises. The judgment of the court below will be reversed, and the cause remanded, the other judges concurring.

RENSHAW, Defendant in Error, vs. STEAMBOAT PAWNEE,
Plaintiff in Error.

1. The admissions of the owner of a boat, made after the boat has been seized and ordered to be sold, are not competent to establish a demand presented for allowance as a lien upon the proceeds.

Error to St. Louis Circuit Court.

Hart & Jecko, for plaintiff in error. The admissions of Langhorne, made after the boat was placed in the custody of the law, and had been ordered to be sold, were not competent to establish the plaintiff's demand. It is against the reason and spirit of the act, that the owner should be allowed thus to affect the rights of the creditors of the boat, after she has passed from his possession and control. 2. The assignee of a lien claim cannot sue in his own name and enforce the lien under the boat and vessel act.

Krum & Harding, for defendant in error. 1. Langhorne's answer was properly admitted in evidence, because it was the admission of the owner of the boat. *Phelps v. Steamboat Eureka*, 14 Mo. Rep. 532. The admission was made before the sale, while Langhorne was still the owner, but even if it had been made after the sale, Langhorne was the owner of the fund arising therefrom, and was as competent to bind that, as to bind the boat. 2. The suit was properly brought by Renshaw, the assignee, in his own name.

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RYLAND, Judge, delivered the opinion of the court.

The question in this case regards the admission of the answer of Langhorne to prove the indebtedness of the steamboat Pawnee to Renshaw, the present respondent. The boat had been seized by the sheriff of St. Louis county, on the 16th of June, 1853, by virtue of two writs from the Court of Common Pleas, and no bond being given, the boat was ordered to be sold. This order was made on the 22d of June, 1853; the sheriff sold the boat on the 19th of July following, and William Renshaw, jr., became the purchaser.

William Renshaw, jr., the respondent, made his complaint against the steamboat for the sum of \$754 66. He charged that this claim accrued on account of services rendered Maurice Langhorne, the master, by one William H. Leonard, as pilot on the boat; also for services rendered by one Wiley Jones, also as pilot on said boat; also for services rendered by one John Mangan, as second mate. The said Renshaw averred that all these claims had been assigned to him by these persons; thereupon a warrant issued in his favor against the said boat, on the 29th day of June, 1853, after the order of sale had been made on the two warrants first mentioned above, but before the day of sale, which was the 19th day of July. On the 20th day of October, 1853, said Langhorne, alleging that he was sole owner and master of the said boat, filed his answer to the complaint of Renshaw, admitting the demand and authorizing judgment to be entered for the amount. This answer was subscribed and sworn to by Langhorne, on the 5th day of July, 1853, before the sale of the boat. On the 21st of October, 1853, judgment was rendered by the court on this claim, in favor of Renshaw, for the sum of \$769 75, and placed in the first class. The bill of exceptions shows that when this claim of Renshaw was presented for allowance, he offered to prove it by the answer of said Maurice Langhorne. He proved that Langhorne was master and owner of the boat, Pawnee, at the time she was seized by the sheriff, on the

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two writs from the Common Pleas ; then offered his answer, confessing the debt and authorizing judgment therefor ; to which answer the creditors of the boat objected, and Harlow, one of the creditors, prayed the court to reject the answer of Langhorne, as proof of any indebtedness by the boat. But the court overruled the objection, permitted the answer to be read, and the creditors excepted to this ruling of the court. This being all the evidence, the court rendered judgment for the claimant. A motion was made to set this judgment aside, which being overruled, exceptions were taken, and this case comes here by writ of error.

1. In ordinary cases, no doubt, the owner of a boat is competent to admit its indebtedness. *Phelps v. Steamboat Eureka*, 14 Mo. Rep. 535. The statute declares, " that neither the captain, clerk nor other officer of any boat or vessel, shall have power to bind the boat or vessel, by giving bonds or notes, or by making any other admission of indebtedness of the boat to any person whatever." This prohibition extends to officers, as such, and not to owners. The person who is both captain or master and owner may bind his boat, by admitting its indebtedness. It was to protect the property of owners of boats from liability to seizure by the admissions of officers of the boats. There was no reason why an owner could not be allowed to give his note or to make his admission of the indebtedness of his own boat.

So much, then, for the authority of the owner, in ordinary cases ; but in this case now before the court, the creditors of the boat contend that Langhorne, whose boat had been seized, was ordered for sale, was sold, and the proceeds directed to be distributed among the creditors, was not considered as owner ; nor was it competent for any admissions he might make, to be given in evidence, in a controversy among the creditors of the boat for distribution.

Here is a controversy in which the creditors of the boat are engaged : a dispute which they are carrying on among themselves as to the debts of the boat ; in this dispute, Lang-

horne himself would have been a competent witness. But the admissions of Langhorne, made after the order of sale, we consider not competent. It would open the door to immense fraud, to allow an owner, by his admissions, to change the rights of the parties. The boat had been taken from Langhorne by the officers of the law; he could not then be considered such an owner as, by law, was authorized by any admissions or conversations after this act, and an order of sale of the boat, to affect the boat; he could not increase the liabilities or debts of the boat by mere admissions. His admissions were but hearsay evidence; they should have been rejected. This case is similar in principle to the case of *Smallcombe v. Burges*, 13 Price, 136. (6 Eng. Exch. Rep. 51.) In this case, it was held that an acknowledgement of a debt by a trader, who had become bankrupt, by an admission made *before the issuing of the commission*, to an attorney employed by the assignees, in an action of trover, brought by them against a third person, on account of the estate, is not admissible in evidence to establish the petitioning creditor's debt in proving the bankruptcy in support of such an action, if the admission were made *after the act of bankruptcy*. Alexander Lord, Chief Baron, said: "The question for our consideration in this case was, whether an acknowledgment by the bankrupt of the petitioning creditor's debt, in a conversation which took place between him and the witness, after the act of bankruptcy, but before the commission issued, could be received in evidence in support of the commission. Such admission was held not receivable in evidence by the whole court. The Chief Baron said: "I consider that it is clearly established law, that a bankrupt, after the act of bankruptcy, is incapable of affecting his estate by any act of his. He cannot contract a debt, nor do any thing to affect his property in any manner. He cannot part with it, or, by any means, bind it in any respect. Now, if this be so, it would be most extraordinary to hold that, whilst he was under all these disabilities, he might yet, notwithstanding, by means of such a conversation as this, in which he should think fit to ad-

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mit a prior debt, so produce that very effect indirectly, by an acknowledgment of the existence of such a debt, made at a period when he could not otherwise affect or change his estate by any one direct *act* of his own. That would be holding that he might still do, in effect, by an easy device, the very thing which the policy of the law disallows, by disabling him from doing so by any direct means." It was said by one of the Barons, in this case, "if these declarations are to be admitted in evidence, and if conversations are to be received to establish debts due from a bankrupt, in such a case, at a time when he has no interest in his property, he may, by declarations of this sort, create liabilities to the extent of the whole of his estate, in respect of individuals who may have no legal demand on him." It was held by the court of exchequer, that declarations made by a bankrupt, after the act of bankruptcy, but before the issuing of the commission, are not admissible in evidence to prove the petitioning creditor's debt. This is now an established rule of evidence.

The boat, in this case before us, had gone into bankruptcy. She was in the hands of the officers of the law. The court had ordered the sale of the boat; the creditors were notified to appear and exhibit and prove their claims. She was not any longer in the custody of the owner. After the order of sale, the owner had no power to bind the boat by his admissions, and such admissions should not have been received in evidence. It makes no difference that the answer of Langhorne was signed and sworn to before the sale of the boat; it was after its seizure, and after the order of sale, and at the time when offered by Renshaw to prove his claim, was nothing more than hearsay evidence. This answer should have been rejected.

The judgment below is reversed, and the cause remanded, the other judges concurring.

Auvray v. Steamboat Pawnee.

AUVRAY, Plaintiff in Error, vs. THE STEAMBOAT PAWNEE,
Defendant in Error.

1. Where a boat is seized, and bond is given under the ninth section of the act concerning boats and vessels, (R. C. 1845,) the lien is discharged, and the party cannot, after the boat has been sold, present his demand for allowance against the proceeds.

Error to St. Louis Circuit Court.

A. J. & P. B. Garesché, for plaintiff in error.
Krum & Harding, for defendant in error.

GAMBLE, Judge, delivered the opinion of the court.

The steamer Pawnee having been sold under the eleventh section of the act concerning boats and vessels, and the court proceeding under the subsequent sections to hear and allow the claims of creditors of the boat, the plaintiff, Auvray, exhibited his demand, which was opposed by other creditors and rejected. From this decision, he appealed to this court.

It appears that he had, before the sale of the boat, commenced a suit upon his demand, and had seized the boat, and that bond and security had been given by an owner of the boat under the ninth section of the act which, under that section, had the effect of discharging the boat "from the lien of the plaintiff's demand."

1. When a boat is sold under the eleventh section of the act, the court ordering the sale is required to appoint a time at which all creditors of the boat, *having a lien upon the same*, shall appear and exhibit their demand. Sec. 14. By section 16, when the claims against a boat are decided, those that are allowed shall be classed *according to the order of liens*, as in the act prescribed.

After the plaintiff had seized the boat and bond was given under the ninth section, he could not have judgment against the

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boat, but the judgment must be against the principal and security in the bond. It is perfectly obvious, that the plaintiff had no lien upon the boat when it was sold, and consequently had no right to come in for a share of the proceeds of such sale. He had his security in the bond which had been taken, and in which the other creditors had no share. The court, in adjusting demands, was expressly confined to such claims as were liens upon the boat when it was sold.

The judgment of the Circuit Court is, with the concurrence of the other judges, affirmed.

BLAISDELL, Respondent, *vs.* THE STEAM FERRY BOAT WM.
POPE, Appellant.

1. An officer seizing a boat has no authority to hold her without bond, subject to final process in the suit. It is his duty to apply for an order of sale, unless she is bonded within five days, under the ninth or tenth sections of the act concerning boats and vessels. (R. C. 1845.)
2. The law commissioner's court has no authority to make an order for the sale of a boat, or to distribute the proceeds.

Appeal from St. Louis Court of Common Pleas.

M. L. Gray, for appellant. 1. When a boat is seized, and not bonded within five days, under the ninth or tenth sections of the act, she must be sold under the eleventh section, for the benefit of all the creditors. To allow the officer to hold the boat, or to release her, and then seize her again at the end of the suit, and sell her under a special *fiери facias*, would be an evasion of the salutary provisions of the eleventh section, and a sacrifice of the rights of the other creditors. It is contended that, when such a course is pursued, the plaintiff loses his lien against the boat, and has his remedy against the officer. 2. The law commissioner cannot issue a special *fiери facias*, commanding the sale of a boat. It has been decided

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by this court that a justice of the peace cannot, (12 Mo. Rep. 288,) and the same reasons apply as forcibly to the law commissioner's court. If the boat can be sold under a special *feri facias*, what will be the effect upon the lien claims? Will the purchaser take the boat discharged of the liens?

A. P. & P. B. Garesché, for respondent. The act of 1851 gives the law commissioner's court jurisdiction of suits against boats, where the demand does not exceed one hundred dollars, and contains no prohibition of a sale of the boat under process from said court. In this respect, it differs from sections 23 and 24 of the act of 1845, giving jurisdiction to justices of the peace, but prohibiting them from selling the boat. The motion in this case was, to quash a special *fi. fa.* issued under the 20th section, applicable to a case where a boat has been bonded under the tenth section. If the officer, instead of taking a bond for the forthcoming of the boat, chooses to release her, and take upon himself the risk of her being forthcoming to answer the judgment, it is a risk which cannot affect the plaintiff's right, and of which the defendant, who has reaped its advantage, cannot complain; and if, as in this case, the boat is in fact forthcoming, no reason is perceived why she may not be sold, in the same manner as if a bond for her forthcoming had been given. There is no question here of the classification of liens, or of the insolvency of the boat. The proceedings in this case have no reference to those provisions in the act which are intended to meet the case of insolvency.

Scott, Judge, delivered the opinion of the court.

This was a proceeding begun in the law commissioner's court, against the boat Wm. Pope, under the act concerning boats and vessels, by the respondent, for services as engineer of said boat. The boat was seized, but no bond was given under either the 9th or 10th sections of the act. There was a judgment against the boat, and the court proceeded to enforce

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that judgment, under the 20th section of the act, by a special *feri facias*. This proceeding was resisted by a motion to quash, which was overruled, and the boat appealed.

1. The tenth section of the boat law, which allows a boat to be bonded without discharging the lien created by the debt for which she is sued, and the 20th section of the same act which allows a special *feri facias* against her, after she has been thus bonded, seem to serve no other end than to thwart the general object of the law, which was to secure the payment of all liens against a boat, by a sale which would pass an unincumbered title, and applying the proceeds of such sale to the liquidation of the demands against her. This being the main design of the law, sections apparently conflicting with that design, must receive a construction subservient to it. The idea that the officer attaching a boat may hold her without a bond, subject to the final process in the suit, thereby making himself, as it were, the bondsman, cannot be sustained. The officer would have no right to give a bond under the tenth section. That can only be done by the captain, owner, agent or consignee. Having no right to give a bond, he cannot do what is equivalent thereto, substitute the responsibility of himself and sureties for the bond required by law.

The presumption is that, if no person has sufficient interest in a boat to give bond for her discharge within five days after her seizure, she is insolvent, and it is against the policy of the law that the officer should interfere and avert the fate to which she is doomed. Being incumbered with an amount equal to her value or more, there should be no power in the ministers of the law to place her in a situation in which she might increase her liabilities, to the prejudice of those who have already or may thereafter trust her. Where a boat is bonded under the tenth section, should she contract debts subsequently, and be sold to satisfy them, whereby she could not be returned, the debt for which she was seized would be secured by the bond given for her release. For the security afforded by this bond, the officer has no right to substitute himself and his sureties. The act

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would not only be unauthorized, but, if permitted, would be a wrong to the sureties of the officer.

2. No bond having been given, it was the duty of the officer to apply for an order of sale, in pursuance to the provisions of the eleventh section of the act. That application should have been made to the Circuit Court or Court of Common Pleas. The law commissioner had no authority to make an order of sale. The law directs that the claims against a boat shall be audited by the court making the order of sale. Now, the law commissioner's court is one of limited jurisdiction. It cannot hear and determine demands exceeding one hundred and fifty dollars exclusive of interest. There may be claims against a boat exceeding that amount. How can that court, consistently with its organic law, hear and determine them? When the powers of that court are considered, we may infer that the reasons which induced the general assembly to withhold from the justices' courts the authority to order a sale, would have operated to induce a refusal of a like power to the court of the law commissioner. The authority to make an order for such a sale is not incidental or derivative; it is an original power, owing its origin to positive legislation. That power has only been confided to the Circuit Court and Court of Common Pleas. On what principle, then, can it be assumed by the law commissioner's court? These considerations are sufficient to show, that the legislature could not have designed that the law commissioner should have the power to order the sale of a boat.

The other judges concurring, the judgment will be reversed.

GAUL, Respondent, *vs.* WENGER, Appellant.

1. The statement of a witness in his deposition that he is "going to leave the state for Europe to-morrow," will not authorize the reading of his deposition in evidence at the trial, two months afterwards, without some proof of his absence.

Appeal from St. Louis Court of Common Pleas.

This was an action to recover for work and labor, alleged to have been done by the plaintiff for the defendant, at his instance and request. At the trial, the plaintiff was permitted to read in evidence the deposition of Charles Dehault, under the circumstances stated in the opinion of the court, the defendant excepting. After a judgment for the plaintiff, the defendant appealed.

Krum & Harding, for appellant. The court erred in admitting the deposition of Dehault. Depositions can only be read in the cases specified in the statute, (R. C. 1845, §20, p. 419,) neither of which was here shown to exist. The statement of the witness that he *intended* to go to Europe, the next day after his deposition was taken, did not prove that he did in fact go, or that he was absent at the time of the trial. 8 Vt. 404. 6 Randolph, 242. 7 Mo. Rep. 221.

C. Gibson, for respondent. The deposition was properly admitted. The witness stated that he was going to Europe the day after it was taken, and once absent, the presumption is that he remains absent, until the contrary is shown.

GAMBLE, Judge, delivered the opinion of the court.

The only point in the case, which is of any importance, arises upon the admission of the deposition of Dehault, a witness for the plaintiff. The deposition was taken in St. Louis, and in it the witness says: "I am going to leave this state for Europe to-morrow." The deposition was taken on the 9th day of September, 1853, and was read upon the trial, which commenced on the 15th of December following, more than three months after it was taken. The defendant objected to the reading of the deposition, upon the ground that the absence of the witness was not shown, so as to entitle the plaintiff to read the deposition.

The court was satisfied with the statement of the witness that he was going to Europe, and admitted the deposition with-

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out any other evidence that he was out of the reach of the process of the court.

1. The 20th section of the act concerning depositions, (R. C. 1845, p. 419,) states the cases in which depositions may be read, and gives as the first, the case where "the witness resides or is gone out of this state." When a deposition is offered, it must be made to appear to the court that a case exists in which the law authorizes it to be read. If it is offered on the ground that the witness, whose residence is within the state, and less than sixty miles from the place of trial, has gone out of the state, it must be shown to the court that he has left the state. In the present case, it was shown that the witness intended to go to Europe three months before the trial. Whether he did go, or whether if he did he was still absent, did not appear. The court might have been satisfied, after such declaration upon oath, with very slight evidence that he had actually gone and that he had not returned, but it was not a compliance with the statute to take the witness' declaration of his intention to go, as proof that he did go; nor would it be sufficient evidence that the witness was absent from the state at the time of the trial, that he had gone to Europe more than three months before. In these days of rapid travel, three months will allow sufficient time for a man to leave the banks of the Mississippi and visit many parts of Europe and return home. The court should have required evidence that the witness was absent from the state. The judgment is reversed, and the cause remanded, the other judges concurring.

ENGLER, Plaintiff in Error, *vs.* BATE, Defendant in Error.

1. A denial of indebtedness is not a sufficient answer to a petition which sufficiently charges that the indebtedness arose out of breaches of a specific contract. The breaches must be denied.
2. A case where the answer filed sets up no sufficient defence is not one coming within the rule of the St. Louis Circuit Court, requiring the plaintiff to file an abstract of the pleadings.

Error to St. Louis Circuit Court.

When this cause was called for trial in the Circuit Court, no abstract having been filed in accordance with a rule of the court, the defendant claimed a nonsuit, which was granted by the court. The rule is as follows:

"In all causes commenced since July 4th, 1849, which are to be tried by a jury, the plaintiff shall file, for the use of the court, two days before the same are set for trial, an abstract of the pleadings, indicating clearly the issues to be tried; in default of which, the same will not be considered as prepared for trial, and the plaintiff shall be nonsuited, or the cause be continued at his cost, if the defendant so elect."

The pleadings are sufficiently stated in the opinion of the court. The plaintiff sued out a writ of error.

C. C. Carroll, for plaintiff in error. The rule of the Circuit Court is obscure, ambiguous and unconstitutional. It is a delegation of the judicial power vested in the court to the defendant in the cause.

Knox & Kellogg, for defendant in error.

GAMBLE, Judge, delivered the opinion of the court.

The petition in this case, although it alleges that the defendant is indebted to the plaintiff in five different sums, on different considerations, and although it refers to an account filed with the petition, shows sufficiently that the whole demand arose out of a contract for the purchase of pork by the plaintiff from the defendant. It is a specimen of the very great looseness in pleading, occasioned by the reform introduced into our practice. Instead of setting out the contract, and stating the particulars in which the defendant had failed to comply with it, the petition states indebtedness of the defendant in specific sums, for his failure to comply with his contract in different particulars, leaving the court to conjecture what the contract was, but alluding to it in such terms as to show that

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there was a contract for the sale of three hundred barrels of mess pork by the defendant to the plaintiff. One or two of the statements in the petition will show the form of allegation adopted by the pleader. It is alleged that the defendant is indebted to the plaintiff in the sum of thirty-three dollars and twenty-five cents, "for that much money overpaid by plaintiff to defendant, in the purchase of a lot of mess pork of three hundred barrels, there being two barrels short weight in said lot;" also, in the sum of seven dollars and eighty-seven cents, "there being that much difference between rumps delivered to plaintiff and mess pork contracted by defendant to be delivered to plaintiff;" also, in the sum of one hundred and twelve dollars and fifty cents, "there being that sum lost in the sale of said purchased pork, on account of a deficiency of salt which ought to have been supplied by the defendant."

1. To the petition thus constructed, the defendant files an answer, which is nothing more nor less than the plea of *nil debet*. The defendant, no doubt, understood the petition as founded upon violations of a contract for the sale of pork, and yet, instead of answering the substance of the charge, he answers merely that he is not indebted. Whether he failed to furnish the full amount, or furnished rumps instead of mess pork, or failed to use the requisite amount of salt, is all supposed to be involved in the answer that he is not indebted. In *Sappington v. Jeffries*, 15 Mo. Rep. 629, it was held, that *nil debet* was not a sufficient answer in a case upon a note. In the present case, the petition, although very inartificially drawn, gave to the defendant notice of the violations of contract upon which his alleged indebtedness arose, and he should have answered them, and not merely have stated that he was not indebted. In another case at this term, of *Westlake v. Moore*, a similar answer of *nil debet* was allowed by this court, because the petition did not state the mode in which the indebtedness arose, in such form as to require the answer of any other allegation than that of indebtedness.

2. Regarding the answer then, in this case, as improper, the

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case was not one coming within the stringent rule of the Circuit Court, in relation to abstracts, for it was not a case to be tried by a jury, but one in which the court would have stricken out the answer upon motion. While speaking on the subject of that rule, it may be proper to say that the sanction is altogether out of proportion to the fault of the party or his attorney. A nonsuit, which must produce great delay, and may impose a great burden of costs, and even occasion the loss of the cause of action, should not be lightly imposed for a failure to do an act, which looks only to the convenience of the judge in learning the nature of the issues.

The judgment is reversed, and the cause remanded.

GUYOL, Plaintiff in Error, *vs.* CHOUTEAU *et al.*, Defendants in Error.

1. A party cannot in any case obtain the benefit of a confirmation to another, unless it appears that his title was the basis of the confirmation.
2. Claimants who failed to exhibit their titles for confirmation before they were barred by acts of congress, cannot afterwards claim the benefit of a confirmation to another.
3. If a person is guilty of a fraud, or affects himself with a trust, in obtaining a confirmation, the party seeking the benefit of it must state these facts as a ground of relief. He cannot recover in a simple action of ejectment.
4. Where there are conflicting claims, the one confirmed is the better title.

Error to St. Louis Court of Common Pleas.

This was an action in the nature of an ejectment, begun in 1852, by Mary Louise Guyol and two others, claiming to be children of Antoine Roy and Felicite Vasquez. The facts stated in the petition sufficiently appear in the opinion of the court. A demurrer to the petition was sustained, and the plaintiffs sued out a writ of error.

S. Simmons, for plaintiff in error. 1. The property acquired from Bolduc entered into the community existing be-

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tween Roy and wife. Upon the death of Mrs. Roy, one undivided half of it descended to the plaintiffs, free from the control of Roy, unless by the intervention of the law. 2. Roy held the title obtained by the confirmation to him in trust for the parties beneficially interested. *Groves' heirs v. Fulsome*, 16 Mo. Rep. 548. The plaintiffs were minors when Roy obtained the confirmation, and consequently incapacitated to make and present their claim. The confirmation, therefore, should enure to their benefit equally with his own.

Barton Bates, for defendant in error. The confirmation to Roy was *prima facie* for his own use entirely. The plaintiffs do not show that they were in such a position that the confirmation enured to their benefit. If they ever had any rights, they became fixed and vested by the death of their mother, before the passage of the first act (of 1805) creating the board of commissioners. They were, therefore, as much bound as other persons to make their claim before the board, and having failed to make any, cannot go behind the confirmation. *Strother v. Lucas*, 6 Peters, 770. *Strother v. Lucas*, 12 Pet. 412. *Chouteau v. Eckart*, 2 Howard, 344. *Les Bois v. Bramell*, 4 Howard, 459. *Bissell v. Penrose*, 8 Howard, 338. *Grignon v. Astor*, 2 Howard, 319. *Landes v. Brant*, 10 Howard, 370. *Landes v. Perkins*, 12 Mo. Rep. 238, 254. *Janis v. Gurno*, 4 Mo. Rep. 458. *Harold v. Simonds*, 9 Mo. Rep. 326. Upon the death of Mrs. Roy, if the property was held in community, the one half descended to her heirs, and they had a legal estate, if any. *Picotte v. Cooley*, 10 Mo. Rep. 312. *Lindell v. McNair*, 4 Mo. Rep. 380.

GAMBLE, Judge, delivered the opinion of the court.

The demurrer to the petition having been sustained, the sufficiency of the petition is the only question. The plaintiffs state a marriage between Antoine Roy, their father, and Felicite Vasquez, their mother, at St. Louis, in 1792; that in 1793, the father and mother acquired by deed, from Louis Bolduc, a

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certain lot in St. Louis ; that the mother died in 1803 ; that the lot was confirmed to the father, Antoine Roy, on the 10th of June, 1811 ; that the father died in 1815 ; that the defendants, claiming under Antoine Roy, but without any title from his wife, hold possession of the lot ; that the plaintiffs are the children and heirs of Roy's wife, and as such, entitled to one half of the lot as part of the community created by law, and they pray judgment for the possession of that half.

The conveyance from Bolduc is not made a part of the petition, nor is the confirmation to Antoine Roy, which, from its date, must have been made by the first board of commissioners. It is impossible to say whether the title derived from Bolduc was the basis of the confirmation to Roy, and yet the title from Bolduc is the only one in which the plaintiffs pretend to have any interest.

Again, if the plaintiffs now have title, they had it immediately on the death of their mother in 1803, and if so, it should have been exhibited for confirmation, as was required by the acts, under the penalty of being barred.

The Supreme Court of the United States, in *Strother v. Lucas*, 12 Peters, 448, hold that these acts of congress are in the nature of statutes of limitation, and that the courts can make no exceptions to their operation. If the claim was not presented, the party cannot claim the benefit of a confirmation to another. If there were any circumstances of fraud in the person obtaining the confirmation in his own name, which could affect him with a trust in favor of those interested in the title, the circumstances must be stated as a ground of relief, so that the title, which the government has passed to him, may be decreed to pass to those interested. The present action is simply an action of ejectment, founded upon the plaintiffs' title. If there were conflicting claims to the lot, in Antoine Roy and in the plaintiffs, the confirmation to Roy, according to a series of decisions in the Supreme Court of the United States, must be held to pass the title to him. The demurrer was rightly sustained, and the judgment is affirmed.

Robinson v. McFaul.

ROBINSON & WENTZ, Defendants in Error, vs. McFAUL,
Plaintiff in Error.

1. A release of a parol contract before breach need not be under seal. Thus, where goods are consigned to two partners for sale, one of them, who retires from the firm before the goods are sold, and is verbally released, is not liable for goods subsequently sold by the remaining partner.
2. One partner who confesses an action is, under the code, a competent witness against his co-partner who defends it.

Error to St. Louis Circuit Court.

C. B. Lord, for plaintiff in error. The court erred in striking out the answer, as it contained a good defence to so much of plaintiffs' claim as arose after the dissolution. Story on Part. §153. Bisset on Part. 90. *Godfrey v. Saunders*, 3 Wilson, 94. 1 Livermore on Agency, 80, 84. *Wells v. Ross*, 7 Taunt. 403. *Bank of Wilmington v. Almond*, 1 Whart. 169. Gow on Part. 149.

L. K. Kinsey, for defendants in error. No agreement is shown by the answer of McFaul to discharge him, nor any circumstances operating as a satisfaction by him; nor is there any consideration for such agreement, or any change of security shown. Collyer on Part. 324, 327. *Harris v. Lindsay*, 4 Wash. C. C. R. 271. *Thompson v. Percival*, 5 Barn. & Adolph. 925. *Wells v. Ross*, 7 Taunt. *Hebertson v. Jepherson*, 10 Barr.

SCOTT, Judge, delivered the opinion of the court.

The respondents sued Mogridge & McFaul on an account, for goods consigned to them for sale. The account was rendered in the name of the defendants, by Mogridge, up to the 20th of September, 1853, in which there was a balance admitted against them of \$827 22.

Mogridge, one of the defendants, confessed the action. McFaul answered, denying any indebtedness to the plaintiffs;

that the partnership between himself and Mogridge was dissolved by mutual consent about the 8th day of June, 1853; that notice of this dissolution was given to the plaintiffs; that after notice of the dissolution of the partnership, the property previously consigned to them was allowed to remain in the hands of Mogridge, who, the plaintiffs were informed, would carry on the contracts of the firm on his own account; that the plaintiffs recognized the dissolution and released this defendant from all liability to them. This answer was judged insufficient, and judgment for want of answer was entered up against McFaul.

1. The question is, as to the sufficiency of this answer. Taken in connection with the petition, the answer is sufficiently intelligible. There is no person of ordinary understanding who reads it, who does not perceive the precise point of the defense. The fact pleaded is a good defense for McFaul. It is a legal one. A verbal release, or a release not under seal, (the word is not used in its technical sense,) of a parcel contract before any breach thereof, is a good defense to an action on that contract. Goods were consigned to two partners to be sold. Before the goods were sold, one of the partners left the firm by mutual consent. The consignors were informed of this fact. They recognized the dissolution and released the partner who left the firm, knowing that the business would be carried on by the other partner. Can any thing be clearer than that the partner who left the firm is not liable for goods sold subsequently to the release? Some might have written a much fuller answer, but we all know that the present practice act has generated great carelessness in the preparation of the pleadings in causes. Many seem to think that any thing will do for a petition or an answer, and the object of the act is entirely lost sight of or misconceived. So far from pleadings being abridged, they have become much more voluminous than formerly, and the matter in dispute is clouded with a verbiage which confounds rather than enlightens those on whom the administration of justice is devolved. Under these circumstances, it is better to err on the safe side, and try the

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truth of an answer, which can do no harm, than to strike it out, whereby irremediable injury may be done.

2. We see no objection to using the defendant, Mogridge, as a witness for the plaintiffs. The 11th section of the 24th article of the present practice act allows this to be done. N. Y. Code of Practice, 293, notes. The other judges concurring, the judgment will be reversed, and the cause remanded.

MOONEY, Respondent, vs. KENNETT, Appellant.

1. Under the code, where several causes of action are united, each one must be separately stated. (*Childs v. Bank of Mo.*, 17 Mo. Rep. 213, affirmed.)
2. Where several causes of action are joined in one petition, there should be a separate assessment of damages or verdict in each cause. A general verdict for the plaintiff, it seems, will not stand, if one of the causes of action, as stated, is insufficient to support a judgment.
3. Where several causes of action are blended in violation of the rules of pleading, the proper way of correcting the irregularity would seem to be by motion to compel an election.
4. An erroneous instruction, as to damages for an assault and battery.
5. In an action for a wrongful prosecution, a petition which omits to state that the prosecution was malicious, and that the plaintiff was acquitted, is insufficient.
6. Courts do not take judicial notice of city ordinances. If a party relies on an ordinance, he should set it out in his pleading.

Appeal from St. Louis Law Commissioner's Court.

The petition stated that the defendant assaulted and laid violent hands upon the plaintiff, and "wrongfully, illegally and unjustly caused him to be arrested by a police officer of the city of St. Louis, under a pretended charge of having violated a city ordinance," whereby he was compelled to give bail for his appearance or be imprisoned in the calaboose; and that the defendant, "wrongfully, injuriously and oppressively, illegally and unjustly caused two separate charges to be made and prosecuted against the plaintiff for alleged violations of city ordi-

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nances," &c. The plaintiff claimed damages to the amount of one hundred dollars. No malice was alleged, nor was it alleged that the plaintiff was acquitted of the charges.

The defendant answered, denying the allegations of the petition. He stated that, at the time of the injuries complained of, he was mayor of the city of St. Louis, and as such, chief of its police, and that he found the plaintiff in what he then believed and still believes to be a violation of a city ordinance, and remonstrated with him, whereupon the plaintiff shook his fist at him and threatened to knock him down; that he afterwards laid the matter before the captain of the city guard, to take such steps as might secure an observance of the city ordinances. He denied that he was actuated by any malice towards the plaintiff, or by any other motive than a desire faithfully to discharge his official duties.

At the trial, there was evidence tending to show that the plaintiff was driver of an express wagon, which he left standing in a street, in such manner as to obstruct a crossing, and that the defendant came to him in a store, where he was delivering a parcel, and requested him to remove his wagon. Plaintiff replied that he would in a moment. Defendant told him to do it immediately, and laid his hands upon his coat collar. After some words, plaintiff drove off and was afterwards arrested.

The defendant offered to read in evidence a city ordinance, prohibiting the obstruction of streets by vehicles, under a penalty; also an ordinance imposing a penalty for resisting officers in the discharge of their official duties. The court excluded these ordinances, on the ground that they were private statutes, and had not been properly pleaded or referred to as such.

Among other instructions, one was given which is set out in the opinion of the court.

There was a general verdict for the plaintiff for the sum of fifty dollars, and the defendant appealed.

Glover & Richardson and C. G. Mauro, for appellant.

1. The petition fails to state the facts necessary to constitute

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a cause of action for a malicious prosecution. 2. The court erred in refusing to permit the defendant to read in evidence the city ordinances. The 13th section of the 7th article of the code does not require a party to notice, in his pleading, a private statute intended to be used merely as evidence. *Sexton v. Monks*, 16 Mo. Rep. 156.

A. M. Gardner, for respondent.

SCOTT, Judge, delivered the opinion of the court.

1. It would seem from the petition, that this is a suit for a wrongful arrest and prosecution and an assault and battery. There are two causes of action joined, or rather mingled together, in violation of the rules of pleading, as determined by this court, in the case of *Childs v. The Bank of Mo.*, 17 Mo. Rep. 213, and of the forms of pleading, as prescribed in the precedents appended to the present practice act. Those precedents show that, while many causes of action may be joined in one petition, yet each is to be set out separately and apart from the others, with its appropriate prayer for relief—a course indispensably necessary, it would seem, to avoid inextricable confusion. No effort was made by the defendant to relieve the pleadings of this embarrassment, but the parties went to trial, trying both causes of action at one and the same time, as appears by the record, and taking but a single assessment of damages. If the parties will not properly prepare their pleadings in the courts in which their causes are first tried, they cannot expect a reformation of them in this court. Its powers are not competent to such an undertaking. No such authority is entrusted to it. It must take the record as it is, and affirm or reverse the judgment, as is warranted by the principles of law. The presumption is in favor of the correctness of the judgment of the inferior court, and if there is enough in the record to sustain it, it must be affirmed.

2. It was a provision of the late code of procedure, that where there are several counts in a declaration, and entire dam-

ages were given, the verdict should be good, notwithstanding one or more of the counts should be defective. If the present practice act is properly administered, such a state of things cannot arise under it. If, however, under the present act, two distinct causes of action are blended and tried together, and a single assessment of damages is made, and one of the causes of action is insufficient to sustain a judgment, or there has been error in the trial of it, and the other is sufficient and the trial of it has been regular, what is to be done? Will the legal cause of action, with its regular trial, support the verdict, without regard to the defective cause of action or the error in the trial, notwithstanding it is obvious that the defective cause of action, or that in the trial of which there may be error, was considered by the jury in assessing the damages. Where several causes of action are joined in one petition, there should be a separate assessment of damages or verdict in each cause; otherwise, when a new trial is had in one cause of action, there must necessarily be a new trial as to all, where it is apparent that the verdict, as to some of them, is correct. This course, too, will enable the plaintiff to enter a *nolle prosequi* as to one cause of action, and take a judgment for the rest. A general finding for the defendant, on a petition containing several causes of action, may be sustained; but where the finding is for the plaintiff, every consideration of propriety requires that there should be a verdict in each cause of action, and these will all be blended in one judgment. This course of pleading and practice is also recommended by the considerations that a motion in arrest of judgment will thereby be confined in its effect to the cause of action defectively stated, and plaintiffs will be enabled to see the glaring impropriety of misjoining different parties, between whom there is no privity in the same action. It is now become a common practice to unite an action of ejectment with a petition for partition, thus making the tenant in possession wait the event of a litigation in which he has no interest, before his part of the suit can be tried.

3. As the present practice act does not prescribe a mode by

which this irregularity in pleading can be corrected, and as this is not one of the enumerated causes of a demurrer, the most suitable mode of redress, in such cases, would seem to be a motion to the court to compel the plaintiff to elect for which cause of action he will proceed. An election of one of the causes will not have the effect to prevent a future action for the other causes. In all cases of election, the costs would be at the discretion of the court, to be governed by the circumstances, so that justice may be done.

4. In the case under consideration, there was an instruction given in relation to the assault and battery, which cannot be sustained. The jury was told that, although they may believe from the evidence, that the defendant had probable cause for giving information of the violation of the law by the plaintiff, still this does not authorize or justify the defendant in committing an assault and battery upon the person of the plaintiff, and if the jury also believe he did so commit an assault and battery, the law presumes it to have been done maliciously, and the jury are at liberty, in such case, to render a larger amount than the amount actually paid by the plaintiff, by way of smart money. We know of no principle which justifies such an instruction in a trial for an assault and battery.

5. The cause of action, as to the wrongful prosecution, as stated, does not aver that the injury was done maliciously, whereas, malice is of the essence of the action; but even if this was not fatal, surely the omission to show that the plaintiff was acquitted of the prosecution, is a fatal objection to this portion of the petition.

6. The court did not err in refusing, as evidence, the ordinances of the city. The courts of the state do not take judicial notice of the ordinances of any town or city. The defendant must set forth his justification in his answer. If he relies on the ordinances of the city, he should set out so much of them as may be necessary for his defence, that the plaintiff may know on what he relies. It is obvious that the 8th section of the 7th article of the practice act does not affect this matter,

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as it relates only to the private acts of the general assembly. It is only necessary to read the defence set up by the defendant, in his answer, as to the wrongful prosecution, to be satisfied of its insufficiency. The facts are pleaded in such a way as not to constitute any justification for the act complained of.

The other judges concurring, the judgment will be reversed, and the cause remanded.

WESTLAKE, Plaintiff in Error, vs. MOORE, Defendant in Error.

1. A simple denial is a sufficient answer to a simple allegation of indebtedness.

Error to St. Louis Circuit Court.

Hudson & Thomas and Fenty, for plaintiff in error.

Knox & Kellogg, for defendant in error.

GAMBLE, Judge. In this case, the question to be determined was merely a question of fact. The plaintiff claimed for services and attendance rendered to defendant on a journey from San Francisco to St. Louis, and for money expended for the use of the defendant. With the petition and as a part of it, is filed an account, in which the money alleged to have been expended by the plaintiff for the use of the defendant, appears to have been expended in defraying the personal expenses of the plaintiff on the journey home. The answer denied that the defendant was indebted to the plaintiff for any one of the items stated in his petition. The question on the trial was, whether the plaintiff had engaged, in consideration of advances made to him in California by the defendant, to attend upon the defendant on the homeward journey without charge. This was the question put to the jury by the only instruction given by the court. The instructions asked by the plaintiff, and refused by the court, were rightly refused, as they were intended to hold the defendant liable to the plaintiff, notwith-

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standing he agreed to attend the defendant without charge. The second instruction asked by the plaintiff and refused, was intended to hold the defendant liable for money expended, because, in his answer, he had not specifically denied the allegation of the petition. The allegation is to be taken in connection with the account filed and made part of the petition, and by it we see that the money was spent in defraying the plaintiff's own personal expenses. In such case, there being no allusion to any special contract, there could be no stronger denial than is contained in the answer of the defendant. He says he does not owe the plaintiff, nor is he indebted to the plaintiff for any one of the items, or for any part of any one of the items set out in the plaintiff's petition; that he does not owe the plaintiff for money paid, laid out and expended by plaintiff for the use of the defendant, either in California or on the voyage from there to St. Louis. He was not bound to deny that the plaintiff paid the money for his own expenses, and he does deny that it was paid for his (the defendant's) use. The court, then, properly refused to tell the jury that this item for money expended was admitted. There is no question of law in the case requiring examination. The judgment is, with the concurrence of the other judges, affirmed.

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ROGERS, Respondent, vs. McCUNE, Appellant.

1. What is a proper precautionary measure in itself, uninfluenced by rule, usage or custom, to avoid collisions of steamboats, is a question of law. Signals by bells are not, as a matter of law, without regard to usage or custom, a proper measure of precaution.
2. It is no error to refuse an instruction based upon a state of facts of which there is no evidence, or the principle of which is embodied in another instruction given.
3. The declarations of the master of a boat, after a collision, as to how it occurred, are not admissible against the owner.
4. The supreme court will not reverse a cause because a leading question was permitted to be asked a witness.

Appeal from St. Louis Court of Common Pleas.

This was an action brought by Rogers, to recover damages for the sinking of the steamboat *Archer*, of which he was owner, by a collision with the steamboat *Die Vernon*, of which the defendant was part owner. The issue made by the pleadings was, whether the collision was occasioned by the negligence of the officers and crew of the *Die Vernon* or of the *Archer*.

The collision occurred about one o'clock in the morning of November 27, 1851, at a point in the Mississippi river, a few miles above the mouth of the Illinois, opposite the upper part of Enterprize island, and just above the head of Roy's island. Enterprize island is on the Missouri side of the river, and its head is about 100 or 150 yards above the head of Roy's island, which is on the Illinois side. The river between these two islands was all channel. Opposite the head of Enterprize island was a sand-bar, making out from the head of Roy's island and the Illinois shore, the western point of which was about sixty yards from the head of Enterprize island. This was known in this case as the upper bar. The collision occurred between this bar and Enterprize island. The *Die Vernon*, which was the descending boat, ran into the *Archer*, the ascending boat, striking her quartering, a little forward of the cylinder timbers, and cutting into her larboard side as far as the keelson. The *Archer* sank immediately, and about thirty-five of her passengers and crew were killed or drowned. The night was dark and hazy, and there was no moon. There was conflicting evidence as to the position of the *Archer* when she was struck. The plaintiff's witnesses located her near the shore or upper bar. The defendant's witnesses located her nearer to the centre of the channel. The pilot of the *Die Vernon*, who was on watch, testified that, as the *Die* was making the crossing above the sand-bar, he saw the lights on the *Archer*, and supposed that she was on the Missouri shore, near Enterprize island. When he reached the head of Enterprize island and straightened down, he still supposed that the *Archer* was on the Missouri

shore, and he tapped the bell of the *Die Vernon* twice, to signify that she would go down the Illinois side. As he bore away in this direction, he heard cries on the *Archer*, and then it seemed to him as if the *Archer* had left the Missouri shore, and was running across the bows of the *Die Vernon*. He rung the stopping bell of the *Die Vernon*, and thought the engines were stopped two hundred feet from the *Archer*, but the *Die* soon struck the *Archer* and sunk her. He stated that he worked the engines of the *Die Vernon* slow from the head of *Enterprize* island; that if he had supposed the *Archer* was on the Illinois shore, he would have tapped the bell once, and have run down the Missouri shore, but as it was, he would have run the way he did, whether he had rung the bell or not. The pilot of the *Archer* testified that he did not hear the signal bells of the *Die Vernon*. He stated that the *Archer* was running along the shore of *Roy's* island, when the lights of the *Die Vernon* were seen about two miles ahead; that the *Archer* proceeded along the shore of *Roy's* island and the bar, until the *Die Vernon* got down to the crossing above the bar; that, as the *Die* was making the crossing, he attempted to give the signal of four taps of the bell, when he found the bell would not ring; he then turned the *Archer* more directly towards the bar, and called down through the speaking trumpet for the mate to come and clear the bell rope. The mate came and attempted to clear the bell rope, but failed. In the mean time, the *Die Vernon* came to the head of *Enterprize* island, and straightening down, appeared to run a short distance in the usual course, but gradually swung around, until at the distance of two hundred yards, she pointed directly towards the *Archer*. The mate and pilot of the *Archer* became alarmed, and began to halloo as loud as they could. The *Die*, however, kept on until she struck the *Archer*. The headway of the *Archer* by this time was nearly gone, and she was very near to the bar. The *Archer* was much the smaller boat, having an average speed of about four miles an hour up stream. The *Die Vernon* had an average speed of from sixteen to twenty miles an hour down

stream, when under headway. The Archer was nearly a total loss. The Die Vernon was not injured.

The defendant read in evidence the following rules, established by the Upper Mississippi river pilots' association, in 1847, and afterwards, as was testified, generally, though not always, observed :

1. The boat descending shall keep the channel, in all cases.
2. The ascending boat shall keep the shore or upper bar, as the case may be.
3. In case of two boats meeting at the point of a bar, the ascending boat shall stop her engine until the other boat has passed.
4. In case of two boats meeting in a chute, the boat ascending shall stop her engine, and drop in shore ; the boat descending shall work slow until she has passed the other boat.
5. No boat descending in the night, in high water, shall run the chutes, under any pretence whatever.
6. In foggy or dark nights, the boat ascending (in case of meeting another) shall stop her engines and tap her bell four times ; the boat descending shall then tap her bell once, if she wishes to run to the starboard, or twice, if she goes to the larboard, to signify to the ascending boat which side she wants to run.
7. Boats on the rapids to be governed by the same rules, excepting in the chains ; there, if a boat be discovered descending, the ascending boat shall stop below the chain until the other has passed, provided it is not in such a place that both can pass in safety.
8. No boat shall be permitted to lock another.
9. In case of two boats ascending or descending, the one ahead shall give the other half the channel, so that the fastest boat can pass.
10. In Fever river, Grand river and Platte river, each boat to keep to the right of the other.
11. All pilots are obliged to give the signals of the bell in the day as well as in the night time, as in article 6.

Witnesses for the plaintiff testified that, by the customs of the river above St. Louis, for a quarter of a century, the ascending boat was bound to keep the shore or upper bar, as the case might be, and the descending boat was bound to keep the channel in all cases. They stated that the custom of signalling introduced in 1847, did not alter the old custom, but that the boats were bound to give the signals in accordance with the old custom; that the object of the signals was, to make the pilots feel certain that they understood each other, and that the descending boat never had the right, by signal, to take away the upper bar from the ascending boat. On the other hand, there was evidence that the descending vessel had the right, by signal, in all cases, to take choice of sides. There was evidence tending to show that, if the ascending boat did not give a signal, the descending boat could, by usage, give the first signal, and also evidence that, if no signal was given by the ascending boat, the descending boat had no right to signal at all. There was evidence that the descending boat had no right to run according to signal, unless it was answered by the ascending boat. On the other hand, witnesses for the defendant testified that it was the duty of the descending boat to run according to her signal, until danger was seen. One witness stated that it was the duty of the ascending boat to give the descending boat the upper bar, if she signals for it, unless the ascending boat signals otherwise. There was evidence that, independent of signals, the Archer was in the proper place for an ascending boat, and the Die Vernon not in the proper place for a descending boat, and *vice versa*.

Thomas Taylor, a witness, whose deposition was taken by the respondent, was asked the following question:

“Is there any custom of the river authorizing the descending vessel, in the night time, to leave the main channel, for the purpose of taking the upper bar away from the ascending boat, as far as you know?”

This question was objected to as leading when the deposition

was taken, but the answer of the witness, to the effect that he knew of no such custom, was permitted to be read at the trial, the defendant excepting.

Florent Meline, a witness whose deposition was taken by the respondent, speaking of the value of the Archer, said: "For the purpose of a ferry boat, I considered her worth \$10,000, judging from the price asked for other boats not so good." This was objected to by the defendant, but admitted. The statement of the same witness, as to the cost of repairs on the Archer, before the collision, was permitted to go to the jury, the defendant excepting. His only knowledge of the cost of the repairs was derived from "bills that passed through his hands." One of the items of the repairs was \$3,200, of which the witness said: "the bill is mislaid; I set it down from recollection; I cannot swear it is correct."

The defendant offered to prove that, immediately after the collision, and as soon as Captain Rogers, the master of the Archer, had got aboard the Die Vernon, he stated in the social hall of the Die Vernon, that the collision was entirely owing to the foul condition of the Archer's bell, and no blame attached to the Die Vernon, her officers or crew. This evidence was excluded, and the defendant excepted. Captain Rogers died a few days after the collision.

The court, of its own motion, gave the following, among other instructions:

8. If the jury believe from the evidence that, by the custom of the Upper Mississippi river navigation, in regard to steamboats, at the time of collision, the Archer was in the proper place for an ascending vessel, and that, at the time of collision, the Die Vernon was not in her proper place as a descending vessel, and that the exercise of reasonable skill, on the part of the pilot and officers of the Die Vernon, would have avoided the collision, and that no act was done by the pilot or officers of the Archer, to mislead the pilot or officers of the Die Vernon, or to produce the collision, and that the officers and pilot of the

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Archer exercised reasonable skill on their part to avoid the collision, then the jury are authorized to find for the plaintiff; and in such case, the measure of damages is the value of the Archer at the time of the collision, and the jury may allow interest thereon from the time of bringing this suit; but the defendant is entitled to have deducted from the value of the boat so lost, the amount that plaintiff realized from the saving of the wreck.

At the instance of the defendant, the following, among other instructions, were given :

11. If the jury find, when the Archer first discovered danger of a collision with the Die Vernon, the said Archer did not use all ordinary and reasonable means in her power to prevent it, they must find for the defendant; or if the negligence of the Archer, in any manner, contributed to the collision, directly or substantially, they must find for defendant.

13. If the jury believe that, in November, 1851, it was the usual and established custom of the Upper Mississippi to give signals by bells where boats met in the night, and the descending boat, after being hailed by the ascending boat giving four taps of the bell, should then indicate which side she would pass, and if the jury believe such custom was known to the officers and agents of the plaintiff, who were managing the steamboat Archer at the time of the collision, and if the jury also find that the Archer, being the ascending boat, gave no signal by bell, and that the descending boat gave a signal, by two taps of the bell at the usual distance, indicating an intention to pass between the Archer and the Illinois island or shore, and if they also find that the collision occurred by reason of the omission, on the Archer, to give any signal, and to obey those given by the Die Vernon, they will find for the defendant. They are also instructed that, whether the omission to give or answer signals by bell, on the Archer, was the result of carelessness or misfortune, would not change the result, if said omission contributed, directly or substantially, to produce the collision.

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All the instructions in this cause are to be considered together, as containing the rules of law applicable thereto.

The following instructions asked by the defendant, were refused :

9. If the jury believe that a signal was given by the *Die Vernon* to the *Archer*, indicating where the *Die V.* would run, and that this was in conformity to the custom in the river at the time, and that the collision would not have happened save for a failure on the part of the *Archer* to comply with or respond to this signal, they will find for the defendant.

14. If the collision complained of was caused wholly or in part by the want of care, skill and foresight in the servants or agents of the plaintiff, in the navigation of the steamboat *Archer*, the plaintiff is not entitled to recover.

15. If the jury believe from the evidence, that there was carelessness and omissions of duty on the part of those engaged in the navigation of both the boats which came in collision, no action can be maintained by either against the other.

Instructions, numbered 7½ and 8, were asked by the defendant and refused, the purport of which is stated in the opinion of the court.

There was a verdict and judgment for the plaintiff, from which the defendant appealed.

Glover & Richardson, Haight & Shepley, for appellant, among others, argued the following points : 1. The court erred in refusing the 8th instruction asked by the appellant. Nothing is clearer, on the score of authority, than that, if a collision is attributable to any act of omission or commission by the plaintiff, there can be no recovery. The refusal of that instruction is equivalent to a declaration that the *Archer* had the right to invite the *Die Vernon* to direct her course into a certain part of the channel, pledging herself to bear away ; and yet, when the invitation is accepted, and the *Die Vernon* runs accordingly, the act is unjustifiable, and she is responsible for consequences. When it is seen that signalling by bells is presented by the instruction as *the measure* used for the pre-

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vention of collision, the error of refusing it becomes still more manifest. The Archer has then neglected the only means usually employed to insure safety. In 6 Wheaton's Rep. 311, and Angell on Carriers, 323, it is laid down that a vessel, to be without fault, must do whatever is customary to avoid collision. 2. The court erred in refusing the instruction asked by the appellant, numbered 7½. The court was here asked to say, without reference to custom, that, if the Archer did neglect to observe an ordinary and proper means of safety, that would constitute a *prima facie* case of neglect at least. But the court says no. The Archer had the right to disregard those precautions of safety which were in ordinary and common use by boatmen to ensure safety, and the fact raises no imputation against her. This certainly must be error. Blatchford C. C. R. 363. Ib. 237. 4 Harr. 232. Daviess, 361. 1 Howard (U. S.) 29. 6 Whart. 323. 10 Howard (U. S.) 579, 585. 19 Wend. 401. 2 Wend. 10. Abbott on Shipping, 300. 3 Kent, 230. Apply these authorities to this case, and the plaintiff's cause of action is utterly destroyed. The court below refused to give any instruction which imputed fault to the Archer, in not having a sufficient bell to return a signal, or in not returning a signal given her. The court required the appellant to show that the collision was caused by this conduct on the part of the Archer, whereas it was the duty of the Archer to show that it was not. If this doctrine is correct, a boat may neglect to carry lights, or competent pilots—may dispense with a rudder or a wheel, and still she may stand a very good chance to avoid all responsibility; for the other party may not be able to show, in point of fact, that any of these things did really cause the collision.

B. A. Hill and *T. Polk*, for respondent. It is contended by the defendant, with more ingenuity than soundness, that the court below was bound to declare that the failure to give the bell signal is to be held as *prima facie* evidence of negligence on the part of the Archer. To this it may be answered, 1st. That the court below was not asked to declare any such rule of

law. 2d. The court could not declare that the failure to signal by bells was *prima facie* evidence of negligence, unless a custom of signalling by bells was found, nor unless such custom had some influence upon the running of boats, and gave the descending boat the choice of sides. These facts are negatived by the finding of the jury, which is sustained by evidence. 3d. The thirteenth instruction declares the failure to give the signals, under the conditions which must necessarily be annexed to any such instruction, to be not only *prima facie* evidence of negligence on the part of the Archer, but a bar to a recovery by the plaintiff, and that, too, without regard to the question whether proper means of precaution were used by the Die Vernon or not. This was laying down the rule as favorably for the defendant as he could ask, and more favorably than the law warrants; for it is obvious that no neglect of one boat can authorize a reckless disregard of her safety by the other. Each boat must be prudently run, according to the necessities of the case. No arbitrary rule can be laid down to authorize any recklessness. The defendant could have had no advantage before the jury by the declaration of a *prima facie* case of negligence, that he did not get under the 13th instruction as a bar to the recovery. The 8th instruction asked by defendant and refused is covered, so far as it is applicable to anything in this case, by the 12th and 13th instructions given. In support of the instructions given, the following authorities are referred to. Angell on Carriers, §643, 644, 650. Mary Stewart, 2 W. Rob. Rep. 244. The Massachusetts, 1 W. Rob. 71. The Volcano, 2 W. Rob. 337. Lecombe v. Wood, 2 M. & Rob. Rep. 290. 21 Pick. 254. 1 Camp. 515. 1 How. U. S. Rep. 89. 2 W. Rob. 201. 3 Carr. & Payne, 528. 9 ib.

SCOTT, Judge, delivered the opinion of the court.

This being a case in which there is a verdict, our task is limited to the examination of the instructions given and refused, and to the points of evidence raised on the trial. Although the rules by which we are governed restrain us from inquiring into

the correctness of the verdict on the mere facts, yet we cannot suppress the opinion that there is ample evidence in the record to sustain the finding of the jury.

Upon the whole case, the custom in regard to signals by bells was made, by the instructions given for the defence, to assume a greater importance than it merited. Although there was evidence which warranted the hypothesis contained in the defendant's instructions, in relation to the custom of giving signals by bells, yet the weight of the testimony, if credited by the jury, was sufficient to show that the custom had no great deal to do with the case. The rules, as adopted by the association of pilots of the Upper Mississippi, where this collision occurred, and as explained, tend to support this view.

1. The chief objection to the action of the court below is, the refusal of the instruction numbered 7½, asked by the defendant. The purport of that instruction was that, if the jury find, at the time of collision, the giving of signals by bells was an ordinary and proper precaution to avoid collision, and the Archer attempted to pass the Die Vernon without employing such a measure, after having received the proper signals from the Die Vernon, she running according to the signals she had given, and otherwise conducting herself with due care, then the burden of proof is on the plaintiff, to show that the collision was not caused by her neglect, and that such omission in no wise contributed to it.

The defendant, in his brief, remarks upon this instruction, "that the court was here asked to say, without reference to custom, that if the Archer did neglect to observe an ordinary and proper means of safety, that would constitute a *prima facie* case of neglect at least."

If the instruction, numbered 7½, had, as was supposed, merely asked a declaration from the court, that the giving of signals by bells was a proper precautionary measure to avoid collisions, whatever might have been said of it in other respects, it would have avoided the objection that it submitted a

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question of law to the jury. The instruction is not as it was conceived to be. It does not refer to the court the question, whether the giving of signals by bells was a proper measure of precaution to avoid collisions, but it is asked to be put to the jury; and in this consists the error of this instruction. What is a proper precautionary measure in itself, uninfluenced by rule, usage, or custom, to avoid collisions, is a question of law. Chancellor Kent says: "There are settled nautical rules by which, in most cases, the want of skill or care or duty may be ascertained." 3, 230. But, as a matter of law, the instruction was wrong. For no signals by bells could be an ordinary and proper measure of precaution for avoiding steamboat collisions, without regard to usage or custom. Such a thing would be impossible. How could a court tell a jury that there should be one, two or four taps of a bell given by this or that boat, without there was a usage? How could it say what one, two or four taps indicated, unless the thing had been previously regulated by rule or custom. Indeed, if the instruction contemplated that signals by bells was an ordinary and proper precaution for avoiding collisions, without regard to the rule or custom, it had no foundation in the facts of the case. As a means of avoiding collisions, signals by bells were never used until 1847, after the adoption of rules by the association of pilots of the Upper Mississippi, by which they were introduced.

2. There was no error in refusing the 8th instruction asked by the defendant, to the purport that if the custom of the river of giving signals by bells was the measure used for preventing collisions, and the *Die Vernon*, in proper time and manner and in good faith, gave signals to the *Archer* that she would pass to the larboard, and otherwise conducted herself with ordinary care and diligence, and the *Archer* neglected to respond by signal, and the custom in such case implied that the *Archer* assented to the signal of the *Die Vernon*, the *Die Vernon* was justified in running according to her signal, so long as she saw

no danger, even though the Archer was unable to respond. There is no evidence in the record which warrants the assumption that the ascending boat assents to the signal of the descending boat, if she does not respond to it. The strongest expression by any witness, in relation to this matter, is, "the duty of the ascending boat is, to give the descending boat the upper bar, if she signals for it, unless the ascending boat signals otherwise." The principle of this instruction moreover, was embodied in a previous one, which had been given for the defendant. The same proposition ought not to be repeated in several instructions, as it serves to give it an undue weight with the jury.

As instructions numbered 11 and 13 had been given for the defendant, there was no error in refusing that numbered 9. Instructions numbered 14 and 15 had been previously given, in substance.

The instruction given for the plaintiff, numbered 8, standing alone, would have been open to objections, but when considered along with those given for the defendant, it cannot be regarded as erroneous, especially as the jury was directed to take all the instructions together, as forming the law of the case.

3. There was no error in excluding the declarations of the captain of the Archer as to the cause of the collision. He was no party to the suit, nor owner of the boat. His declarations could not be regarded as a part of the *res gestæ*. They were not made until after the transaction was past. The admission or declaration of his agent binds the principal only when it is made during the continuance of the agency, in regard to a transaction then depending. It is admissible, because it is a verbal act and part of the *res gestæ*. What the captain said after the collision had taken place, was a recital of the cause of it, and was no part of the transaction whilst it was passing.

4. This court will not reverse a judgment because a leading question has been put to a witness during the trial of the cause. What is a leading question is a matter depending so much upon circumstances, that no rule can be framed on such a subject.

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We all know men who may be safely examined as witnesses by leading questions. If a judgment was reversed for such a cause, would not a willing witness be sufficiently instructed at a future trial to serve the party who brought him.

The witness, Meline, was examined as to the value of the steamboat Archer. Surely there was nothing in his deposition that could prejudice the defendant with an intelligent jury. They would only give it such weight as it was entitled to, from the manner in which he spoke. If it was open to comment, it might have been made to the jury. There was other evidence on this point.

The other judges concurring, the judgment is affirmed.

Soulard *et al.*, Appellants, vs. CLARK, Respondent.

1. Where a record is proper evidence of a fact, it will be admitted, and the opposite party is left to his motion, to exclude irrelevant matter in the record from the consideration of the jury.
2. In order that a claim should have been confirmed by the act of July 4, 1836, it was not necessary that the board of commissioners should *in terms* recommend it for confirmation. The statement of the opinion of the board that it was already confirmed by the act of 1812, is sufficient.
3. Where there was a partition of a joint concession, a confirmation by the act of 1812 would enure to the benefit of each claimant for the portion set apart to him.
4. The act of June 13, 1812, operates as a complete grant. The claimant did not forfeit his rights by a failure to prove up his claim under the act of May 26, 1824, but may establish it in the courts by oral proof of inhabitation, cultivation or possession prior to December 20, 1803.

Appeal from St. Louis Court of Common Pleas.

This was an action of ejectment, brought in 1848, to recover a parcel of land of one arpent in front on Carondelet avenue, in the southern part of the city of St. Louis, by two arpens in depth, in the possession of the defendant. The plaintiffs are the legal representatives of Antoine Soulard, and exhibited the following evidences of title :

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1. A concession to Antoine Soulard, from Zenon Trudeau, dated August 7, 1798, for 14 by 15 arpens.

2. A survey made by Soulard in January, 1800, of the land conceded, the quantity embraced by which survey was 204 arpens and 48 perches.

3. A notice from Soulard to the recorder of land titles of his claim to 56 arpens and 9 perches under the concession, "abandoning the overplus." This notice was dated December 16, 1813.

4. A report of the recorder of land titles, in tabular form, of his opinion upon claims presented for confirmation. The claim of Soulard to 56 arpens and 9 perches is embraced in this report, and reported by the recorder for confirmation. The report does not show any proof of inhabitation, cultivation or possession, but the concession, survey and notice are referred to. This report was confirmed by the act of April 29, 1816.

5. A survey of the whole tract of 204 arpens and 48 perches by Joseph C. Brown, deputy surveyor, in 1818. This survey does not designate the land confirmed by the act of 1816.

6. A confirmation by the act of July 4, 1836, of the whole tract of 204 arpens and 48 perches.

7. An official survey, in 1838, numbered 3124, of the whole tract, as confirmed by the act of 1836.

The surveys of 1800, 1818 and 1838 include the land in controversy.

The defendant exhibited the following evidences of title :

1. A concession from St. Ange to Madame Chouteau, of four by forty arpens, in the Little prairie, dated August 8, 1767.

2. A confirmation to Madame Chouteau's representatives by the act of April 29, 1816, upon the report of the recorder of land titles, upon possession and cultivation prior to December 20, 1803.

3. An official survey, numbered 1827, of the confirmation to Madame Chouteau.

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4. A concession from St. Ange to Gervais, dated August 8, 1767, of two by forty arpens, in the Little prairie, adjoining Madame Chouteau, on one side, and Cambas & Ortiz on the other.

5. A concession of the same date to Cambas & Ortiz of two by forty arpens, bounded south by Gervais, "on condition to establish the said land in one year and a day, and to be subject to public charges."

6. A general notice to the recorder of land titles by the claimants of lots, including those in the Little prairie, dated November 28, 1812.

7. The deposition of Madame Ortiz, the widow of John B. Ortiz. She testified that her husband and Cambas picked wild grapes, and cut wood and wild hay on the lot conceded to them, prior to December 20, 1803; that her husband used the southern arpent, or the one adjoining Gervais, and Cambas, the northern one; that they each owned an arpent in severalty and not two arpens in common; that they were partners in business, but not in the land.

8. A certificate of confirmation to Gervais & Ortiz, issued by recorder Conway, in 1834, and an official survey, numbered 2964. The claims of Gervais & Ortiz were included in one certificate and survey. They were embraced in the list of confirmations furnished by Recorder Hunt to the surveyor general.

9. Proceedings of the commissioners under the act of 1832, upon the claim of Cambas. These proceedings contain the minutes of testimony taken before Recorder Hunt, under the act of 1824. These minutes contain evidence that Cambas & Ortiz cut hay and timber on the two by forty arpens conceded to them, prior to December 20, 1803, and also evidence that they afterwards made a parol division, by which the southern arpent was set apart to Ortiz, and the northern one to Cambas; and also evidence that each possessed and used the portion of the land allotted to him prior to December 20, 1803. The decision of the board upon the claim of Cambas is in these

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words: "The board are unanimously of opinion, that this claim is confirmed by the first section of the act of congress of 1812." To the admission of these proceedings in evidence, the plaintiffs excepted.

10. An official survey for Cambas, numbered 3081, made in 1836, and which includes the land in controversy.

11. The petition of the administrator of Cambas to the general court, dated October 3, 1819, praying an order for the sale of "the half and undivided moiety of a tract of land situated in the prairie, south of the Little river, near St. Louis, having two arpens in front on forty arpens in depth," to pay debts, together with an order of sale, according to the prayer of the petition. The derivative title of the defendant, under this sale, was admitted.

The plaintiffs, in rebuttal, offered some evidence, with a view to show a title by prescription and the statute of limitations. They also proved that Cambas, some years before the change of government, went to the Indian country, on the Osage, where he remained until he died, a year or two afterwards.

The court gave the following instructions asked by the plaintiffs:

1. The confirmation given in evidence by the plaintiffs, did vest in Antoine Soulard and his legal representatives, the legal title to the land therein granted, as against the United States.

2. And as against the said Clark, the defendant, the said confirmation did vest in the said A. Soulard and his legal representatives, a legal title to said land, unless the defendant has shown in himself or some other person a better title to said land.

3. The official survey given in evidence by the plaintiffs, (No. 3124,) is evidence of the locality and boundaries of the land granted to Soulard by the said confirmation, and is conclusive evidence thereof against the United States.

4. And as against said Clark, the defendant, the official survey, (No. 3124,) is evidence of the locality and boundaries of the land granted to A. Soulard and his legal represen-

tatives by said confirmation ; and the jury will consider said survey correct, unless the defendant has shown to their satisfaction that the said survey has been incorrectly made, or that it does not correctly give the locality and boundaries of the land granted by said confirmation to A. Soulard and his legal representatives.

5. That the proceedings of the board of commissioners, organized under the act of congress of July 9, 1832, on the land claim, No. 248, of the commissioners' report, in the name of Jean Cambas, as given in evidence by the defendant, is not any evidence that the title to the land therein mentioned was confirmed or granted by the act of congress of June 13, 1812.

6. That unless Jean Cambas or some legal representative of him, had, at the time of the passage of the act of congress of June 13, 1812, a right, title or claim to the land mentioned in the proceedings of the board, given in evidence, the title to said land was not confirmed to said Cambas or to any legal representative of him, by the said act of congress of 1812.

7. That unless the said Cambas or some legal representative of him, had a right, title or claim to the land, subsisting at the time of the passage of the act of 1812, and also that the said Cambas did inhabit, cultivate or possess the said land prior to the 20th day of December, 1803, the title to said land was not confirmed to said Cambas or any legal representative of his, by the act of congress of 1812.

8. If the jury believe from the evidence that, before the passage of the act of 1812, said Cambas abandoned the right, title and claim which he had, if any, to said land, under the Spanish government, then the title to said land was not confirmed by the act of congress of June 13, 1812.

9. And if the jury believe from the evidence, that said Cambas had no family—no wife, child, heir, nor blood relation in the country ; that he left the civilized settlements and went into the Indian country before the change of government, with an intention of not returning to St. Louis, and that he died in

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said Indian country, without having returned to St. Louis, and that no claim was set up in his name to said land, until long after the passage of the act of June 13, 1812, these facts or any of them the jury may consider as evidence tending to show an abandonment by him of his claim.

10. If the jury believe from the evidence, that the Cambas claim is in whole or in part located incorrectly by the survey thereof, given in evidence, and that the true location thereof would not include the said land in dispute, and that said land was included in survey No. 3124, then, as to said land or part thereof, which would not be included by a true location of the Cambas claim, and which is included in survey No. 3124, the defendant and those under whom he claimed, have no title as against the plaintiffs in this action.

After a verdict and judgment for the defendant, the plaintiffs appealed.

E. & B. Bates, for appellants, argued the following, among other points: 1. Cambas never claimed title to any lot of one by forty arpens. The origin of the defendant's title is a joint concession to Cambas & Ortiz, and the administrator of Cambas, in petitioning for the sale of the land, describes it as the *undivided moiety* of a tract of two by forty arpens. It is plain, therefore, that, prior to the 20th of December, 1803, there was no lot of one by forty arpens, and of course, no continuing claim to any such lot on the 13th of June, 1812; and it is plain that Cambas never inhabited, cultivated or possessed any such lot. 2. The concession to Cambas & Ortiz is void by its terms, because not established within a year and a day, nor ever afterwards. The Spanish government then did not encroach upon any right of Cambas, when, in 1798, it conceded the same land to Soulard. 3. The defendant did not show a confirmation by the act of 1812. The volunteer statement by the board under the act of 1832, of their opinion that the claim was confirmed by the act of 1812, is no evidence. The testimony of Mrs. Ortiz did not establish inhabitation, possession or cultivation prior to December 20, 1803.

Again, it was neither a town lot, out lot or common field lot, within the meaning of the act of 1812. Again, if Cambas ever had possession of the land, he abandoned it. He went to the Indian country in about 1783, and never returned. Abandonment will be presumed under such circumstances. 11 Mo. Rep. 3. Again, the claimant cannot now show a confirmation by the act of 1812, having failed to prove it up under the act of May 26, 1824. If the defendant failed to show a confirmation by the act of 1812, a confirmation by the act of 1836 will not help him. 4. The record of the proceedings of the board of commissioners, under the act of 1832, was improperly admitted in evidence. It did not show that the claim was recommended for confirmation, so as to bring it within the confirming act of 1836, which was the only legitimate purpose for which it could be admitted. It was calculated to mislead the jury, as it contained a statement of the opinion of the board that the claim was confirmed by the act of 1812. The error of admitting it is not cured by the instruction of the court that it was no evidence of a confirmation by the act of 1812. *State v. Mix*, 15 Mo. Rep. 153. It contains the minutes of testimony taken before Recorder Hunt in 1825, which is not lawful testimony. *Gamache v. Piquignot*, 17 Mo. Rep. 310. 5. The plaintiffs showed title by prescription and the statute of limitations.

Geyer & Dayton, for respondent. 1. The act of 1812 amounts to a statutory confirmation to all persons who come within its provisions, and the claimants have only to show that their cases are embraced by it. *Vasseur v. Benton*, 1 Mo. Rep. 212. *Gurno v. Janis*, 6 Mo. Rep. 330. *Montgomery v. Landusky*, 9 Mo. Rep. 705. *Page v. Scheibel*, 11 Mo. Rep. 167. When the claimant proves inhabitation, cultivation or possession, his title is equivalent to a patent or grant from the date, June 13, 1812, and the United States cannot divest the title by grant or confirmation to another. 9 Mo. Rep. 323. It is a title superior to a confirmation by the act of 1816, (*Vasseur v. Benton*, 1 Mo. Rep. 212;

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McGill & Somers v. McKee, 15 Mo. Rep. 80,) and of course superior to any confirmation by the act of 1836. It has been found by the jury that Jean Cambas, prior to December 20, 1803, was an inhabitant of St. Louis, and before that day inhabited, cultivated or possessed, as owner, an outlot or common field lot, and that the land in dispute is embraced in the boundaries of said lot, and that it was not abandoned by him or his representatives, prior to June 13, 1812. All the instructions asked by plaintiffs were given, so that there can be no complaint on that score. The facts constituting an abandonment were fairly submitted to the jury. Abandonment is not presumed, and he that relies on it must show such facts as will establish an intention to abandon. *Primm v. Lajoy*, 3 Mo. Rep. 368. The instructions in respect to the surveys were correct.

SCOTT, Judge, delivered the opinion of the court.

This controversy involves the comparative merits of titles under the act of the 13th of June, 1812, resting upon bare inhabitation, cultivation or possession, without any proofs before the recorder of land titles under the act of 26th of May, 1824, and a confirmation under the act of 29th of April, 1816, or of the 4th of July, 1836. The claims of both parties to this suit were barred and made void by the act of the 3d of March, 1807, for the reason that notices, in writing, and the written evidences of their claims, were not delivered to the recorder of land titles prior to the 1st of July, 1808. The concession under which Clark, the defendant, claims, was made in 1767; that under which the plaintiffs claim was made in 1798. Much was said in relation to a condition annexed to the concession granted to Cambas & Ortiz, the non-compliance with which had caused a forfeiture of their grant, which being thereby annexed to the royal domain, the land covered by it was lawfully conceded to Antoine Soulard, under whom the plaintiffs claim. The first American civil commandant of Upper

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Louisiana, speaking of land titles, says: "That the same formality and solemnity were observed in the annexation of lands to the domain, as when they were granted or conceded. All annexations were declared by an ordinance of Louis XV, in 1743, to be null and void and of no effect, unless they were *judicially decreed*. The same principle obtained under the Spanish authorities, and they deemed it obligatory." Stoddard's Sketches, 247. There is no evidence that the concession to Cambas & Ortiz was ever re-annexed to the domain, in any manner, or that there ever was a design to do so. These remarks are made, not as having any influence in the determination of this controversy, but to remove all complaints of hardship, as it is obvious that, after the 1st of July, 1808, all incomplete French or Spanish grants, of which no notice had been given prior to that time, must derive their validity from the laws of the United States. So, whether we look to the laws of France, Spain or the United States, the claim of Cambas is prior, in point of time, to that of Soulard. As to the various objections that were urged against the claim of Cambas, they cannot now be entertained in this court. The law and facts on which that claim is based, have been passed upon by the court and jury which tried this cause. The law, as maintained by the plaintiffs, was declared to the jury. All the law of their instructions was pronounced by the court. No specific complaint is made of any instruction asked by the defendant. If there is any error in the cause, it is in the finding of the facts, and that is a matter with which this court does not interfere.

1. It was urged by the plaintiffs that the court committed error in permitting the record of the proceedings of the last board of commissioners, under the act of the 9th of July, 1832, on the claim of Cambas, to be read in evidence. The proceedings of the same board, on the claim of Soulard, were given in evidence. If they were proper evidence in the one case, they were in the other. The record contained matters, it is true, which were not evidence against the plaintiffs. But the rule of

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practice is well settled that, where a record is proper evidence of a fact, it will be admitted, and the opposite party is left to his motion to exclude the irrelevant matter from the consideration of the jury. An instruction was given, that the record was no evidence that the title of Cambas to the land therein described, was confirmed by the act of the 13th of June, 1812. If this did not reach the objection, it should have been made more specific.

2. It was said that the claim of Cambas was not recommended for confirmation by the board, and therefore it was not within the provisions of the act of July 4th, 1836. That act does not require that a claim should, in terms, be recommended for confirmation, in order that it may come within its purview. The act confirms "the decisions in favor of land claimants." Now, the opinion of the board, that the claim of Cambas was confirmed by the act of the 13th of June, 1812, is certainly a decision in his favor.

3. Whether the claim of Cambas was a lot, whether it was inhabited, cultivated or possessed prior to the 20th of December, 1803, and whether it was abandoned, were questions submitted to the jury under directions from the court, in conformity to the views of the plaintiffs themselves; and as there has been a finding in relation to those facts, this court cannot now interfere. There was evidence from which the jury might have found that there was a partition of the joint concession to Cambas & Ortiz. If such was the fact, then each of them had a claim, and we are not aware of any law which would prohibit each claimant, under such circumstances, from receiving a confirmation for his separate interest, nor of any principle which would prevent the act of 1812 from enuring in that manner. The thing is so reasonable in itself, that an argument is scarcely needed to show its propriety. The government loses nothing by such a course. No more land is granted in the end than if the entire confirmation had been made to the claimants jointly.

As Clark, the defendant, is in possession, and as the jury

have found a confirmation of the claim under which he holds by the act of 1812, no purpose is subserved by attacking his title as derived from the proceedings of the Court of Probate. The confirmation by the act of 1812 is a superior title to any claimed by the plaintiffs, and must defeat their recovery, whether there is any title in Clark or not.

The preceding observations answer the objections urged against the admission of the survey of the Cambas lot, in evidence. None of the instructions raised any question in relation either to the law of prescription or the statute of limitations. Adverse possession of sufficient duration, no doubt, will confer title, both under our law and the Spanish law. If there was possession in Soulard, of a sufficient length of time to confer title, it is unfortunate that he permitted the defendant to occupy the premises undisturbed, so long as to enable him to make the improvements which the record shows are upon the lot in controversy. No reason appears why a more summary remedy than an ejectment was not adopted.

4. An intimation was made that a confirmation under the act of the 13th June, 1812, is unavailing as a title, unless the claimant has, in pursuance to the provisions of the act of 26th May, 1824, made proof before the recorder of land titles of his inhabitation, cultivation or possession, prior to the 20th of December, 1803. By the last mentioned act, claimants were only allowed the period of eighteen months to make their proofs; so if any has failed to do so, it mattered not for what cause, and however inevitable it may have been, under this view, his title is gone. The act itself, by its terms, creates no such forfeiture or consequence. So far from it, its obvious intent was, to enable the government to survey and set apart the lots reserved for school purposes by the act of 1812, to the several villages therein named. So, the only inconvenience which a failure to make the necessary proof could superinduce, would be a collision of the title of a claimant with that of the schools. But, in the event of such conflict, the act no where pretends that the title of the claimant shall give way to that of

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the schools. No principle is known which warrants a court in implying a destruction of a right, in the interpretation of statutes. So penal a consequence should never be left to inference. By an act of the same date with that of the 26th May, 1824, congress has shown that it understands the terms that are to be employed when a right is to be barred or made void, as may be seen by the provisions of the act for organizing a court for the final adjustment of land claims in Missouri. The same thing appears by the act of the 3d of March, 1807, respecting claims in this state, then a territory.

The act of the 13th of June, 1812, though enacted by congress, yet is local, but, though local, is of very great concern to the city of St. Louis. The principles involved in its construction cannot affect even remotely other portions of the United States. That act is familiar to our courts and has been for a great many years. Indeed, it is believed that it is as often cited in connection with the land litigation of St. Louis as any other statute, state or federal. These considerations induce us humbly to claim this act as one of our own, and to indulge the hope that it may always receive that interpretation which has been put upon it by our courts, acquiesced in for a long time by the bar, and acted on by the community.

Ever since the opinion in the case of *Vasseur v. Benton*, which was decided by this court in 1823, the doctrine has prevailed that the act of the 13th of June, 1812, operated as a full confirmation of claims to town or village lots, out lots or common field lots, which were inhabited, cultivated or possessed, prior to the 20th of December, 1803. That act was considered as the title paper, and the party showed his right by proof of the required act, just as he would have done, had he produced a patent conveying him a lot which he inhabited, cultivated or possessed prior to the 20th of December, 1803. No case is known in which this doctrine has been departed from. It was always supposed to be confirmed by the principles announced by the Supreme Court of the United States, in the case of *Strother v. Lucas*, 12 Peters. Since the case first

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referred to, the point has arisen in many cases, and it has always been regarded as settled. It has never been brought up here for revision. In pronouncing opinions, the matter has always been considered as so well settled, that it has merely been mentioned as an axiom would be. *Montgomery & wife v. Landusky*, 9 Mo. Rep. 717. *Gurno v. Janis*, 6 Mo. Rep. 330. The title having passed by the confirmation of the act of 1812, no subsequent legislation of congress could affect it. When the act of 1824 passed, these titles, having been previously confirmed, could only be affected by the legislation of this state. If they were confirmed, and that confirmation was a full title, (as is asserted in *Strother v. Lucas*,) there was no power in congress to affect them by its legislation. In what a novel condition are these titles placed, on the supposition that congress could affect them by subsequent legislation. What was their state from the act of 1812 until that of 1824? There is nothing in the act of 1812 which shows that there could or would be legislation thereafter in relation to private claims. Future legislation in relation to the reserved lands might have been contemplated, but on no principle could it be supposed that claims, which had already been confirmed, would be affected by the imposition of subsequent conditions. The acts of 1812 and 1824 may be regarded as *in pari materia*, so far as the school lands are concerned, and the principles of construction applicable to such statutes may have play in relation to them, but to apply such principles to the individual claims would be like considering the terms of an act annulling a grant, in connection with the previous one conferring it, in order to ascertain the intent of the law makers.

No inconvenience can result from adhering to the received construction of the act of 1812. A claim now for the first time presented, disconnected with any possession, and relying solely on proof of inhabitation, cultivation or possession, prior to the 20th of December, 1803, to defeat another title, would not receive much consideration, and might, without any apprehension of injurious consequences, be submitted to the

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consideration of a jury acting under the directions of the court. But to declare those titles invalid, in which occupants under them have confided for more than thirty years, might bring ruin on many families that have never dreamed that there was any defect in their titles.

Judge Ryland concurring, the judgment will be affirmed. Judge Gamble did not sit in the case.

HUNT, Appellant, vs. SIMONDS *et al.*, Respondents.

1. An action does not lie for a conspiracy to do a lawful act. Thus an action will not lie against the officers of insurance companies for combining to refuse to take insurance on a boat, however malicious their motive.

Appeal from St. Louis Court of Common Pleas.

This was an action brought by Hunt against the officers of the various insurance companies in the city of St. Louis, to recover damages for an alleged conspiracy to ruin him in his business. The petition alleged that the plaintiff, for a period of about nineteen years, had followed the business of a steamboat captain and pilot, as a means of support for himself and his family, and during all that time, had been, and had enjoyed the reputation of being, a prudent, competent and trustworthy captain and pilot; that by reason of his long and constant employment in this business, he was not well qualified for any other pursuit; that in November, 1852, he purchased a steamboat, at an expense of \$12,000, for the purpose of carrying freight and passengers between St. Louis and New Orleans, and that said boat was in every respect well equipped, sound, seaworthy and suitable for the trade for which she was purchased; and that afterwards, the defendants, "in combination, confederacy and conspiracy together, wilful and malicious, and with the intent to injure and wholly ruin the plaintiff in his trade and occupation, without

cause, refused to take any insurance on said boat ;” and that it was agreed between the defendants that they would not take insurance upon any boat in which the plaintiff was interested, or with which he was in any way connected, whereby the plaintiff was compelled to sell his boat and abandon his business. He claimed damages to the amount of \$100,000. A demurrer to this petition was sustained, and he appealed to this court.

U. Wright, Leslie & Barrets, for appellant. 1. Action on the case, in the nature of conspiracy, lies for a civil injury. 7 Cow. 445. 7 Pick. 342. 17 Mass. 182, 186. Brightly’s Rep. 143. 1 Binney, 172. 12 Vermont, 533. 2 Bay, 203. 2 Hall, 277. 6 C. & P. 239. 8 S. & R. 522. 5 Watts & S. 192. 6 Watts, 306. 10 Barr, 372. 8 Barr, 369. 2 Hall, 214. Taylor, 80. The scope of the action is much wider than that of the *writ* of conspiracy, (7 Cow. 445, 7 Pick. 549, 6 Watts, 306,) and wider than that of an indictment for conspiracy. 4 Halstead. *Damage* is the gist of the action, not the conspiracy, and as a consequence of this, one of two conspirators may be found guilty in the civil action. Taylor, 80. *Henchman v. Ritchie*, Brightly’s Rep. 143. 2 Mass. 112. 17 Mass. 182, 186.

2. The conspiracy set out in this case is actionable. A conspiracy is defined to be an agreement or combination to do an unlawful act, or *a lawful act for an unlawful end*. 1 Bouvier, 316. *Henchman v. Ritchie*, *supra*. 4 Metcalf, 111. 5 Harr. & J. 581-2. The law has no legal means to an unlawful end. A combination to ruin and impoverish a man in his business is unlawful *per se*. A baker may refuse me and my family bread, but the bakers of a city cannot lawfully combine and confederate, to the end that I get no bread. So an insurance company may refuse to underwrite for me, but underwriters may not combine and confederate to deny me insurance—to break up my vocation. The demurrer in this case admits that the combination was malicious, and for the purpose of ruining the plaintiff in his business, and that this purpose was accomplished. In 7 Cow. 445, it was decided that an ac-

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tion lies against a conspiracy to lessen the profits of a vocation. *A fortiori*, it lies against a conspiracy to *destroy* the vocation.

Glover & Richardson, Haight & Shepley, Hudson & Thomas, Krum & Harding and *Kasson*, for respondents. 1. The action for a conspiracy has long since become obsolete, and has been superseded by the action on the case in the nature of a conspiracy. The action did not lie at common law in any case, except where the conspiracy was to indict the party of treason or felony of which he was afterwards acquitted. 2 Wheaton's Selwyn's N. P. 1077. 2. In the modern action on the case, the averment of the conspiracy is immaterial, and need not be proved. The action may be brought against one defendant, or if brought against more, one may be found guilty and the rest acquitted. 1 Ld. Raym. 374. 12 Modern, 208. 1 Saunders, note 4, p. 230. *Hutchins v. Hutchins*, 7 Hill, 107. It follows from this, that the true test of the action is, whether it can be maintained against one defendant; and that it can only be maintained where there has been an invasion of a legal right. 7 Hill, 107. 3. It cannot be seriously contended that any one of the insurance companies mentioned in the petition, might not, with impunity, and without giving any reason therefor, have refused to insure the plaintiff's boat or freight bills. Insurance companies are under no legal obligation to underwrite. If any one of them may lawfully refuse to take insurance, the refusal will not be rendered actionable by their conspiracy. *Wellington v. Small*, 3 Cushing, 145, 150.

GAMBLE, Judge, delivered the opinion of the court.

The petition in this case charges the defendants, who are officers of various insurance companies in St. Louis, with having combined, confederated and conspired wilfully and maliciously to injure and wholly ruin the plaintiff in his trade and occupation as commander of a steamboat, and having for that

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purpose, and with the intent of effecting the object, refused, without cause, to take any insurance upon his boat, whereby he was deprived of all benefit from his occupation, and was compelled to sell his boat and abandon his business. This is the strongest statement of the plaintiff's case, set out in his petition. To this petition, there was a demurrer which was sustained by the court below, and the case is brought here to determine the sufficiency of the petition.

1. Among the numerous cases which have been examined, there has been no one found which presents an aspect like the present. All the cases in which damages have been recovered for injuries produced by individuals conspiring against another, are cases in which some positive act was done by the defendants, in pursuance of a common intent. Here the damage to the plaintiff is alleged to have been produced by the refusal of the defendants to make contracts in the ordinary line of their business. It is obviously the right of every citizen to deal or refuse to deal with any other citizen, and no person has ever thought himself entitled to complain in a court of justice of a refusal to deal with him, except in some cases where, by reason of the public character which a party sustains, there rests upon him a legal obligation to deal and contract with others. Innkeepers, who are bound to entertain strangers, and common carriers, who are bound to undertake the transportation of goods, are among such exceptions. But such is not the obligation of underwriters. The business of insuring is but a game of hazard, and there are a great many elements entering into the calculations upon which it can be safely pursued. The seaworthiness of every vessel upon which insurance is asked, is made up of its staunchness and suitable equipment, and the skill, competency and fidelity of its officers and crew; and upon each of these points, very different opinions may be entertained by different persons, as is shown by the cases in which such questions have been in controversy. A man may possess the requisite skill to command a boat, and yet an underwriter may be unwilling to take the hazard of his fidelity, although it

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may be impossible to prove any particular act of misconduct. While, in the present case, we are to take the plaintiff to be, as is alleged in his petition, a skillful, competent and faithful commander, yet the right of the defendants still remains unaffected, which is to decide for themselves whether they will put their money at risk or not, by insuring upon property under his charge. To assert the contrary, is to assert that underwriters are bound in law to insure property whenever insurance is asked, and the vessel is staunch and well equipped, and provided with competent and faithful officers and crew. If, under such circumstances, they are not bound to insure, then the refusal to insure is not the denial of any right belonging to the owner of the property upon which insurance is sought.

The present action, then, is founded upon the idea that the defendants are responsible for an injury sustained by the plaintiff in his occupation, because they conspired to effect that injury, although the means employed were not, in themselves, illegal or immoral.

A writ of conspiracy, properly so called, did not lie at the common law in any case but where the conspiracy was to indict the plaintiff of treason or felony, and a verdict had been rendered in his favor. 1 Saund. 230, note 4. *Jones v. Baker*, 7 Cowen, 449. This remedy required that two persons, at least, should be charged, and the judgment must be rendered against two, upon the ground that the conspiracy being the basis of the proceeding, it was necessary to the establishment of the conspiracy that two should be convicted.

The writ of conspiracy has given place to the action on the case, in the nature of a writ of conspiracy, and this action may be sustained against one alone. *Skinner v. Gunton*, 1 Saund. 228. *Laville v. Roberts*, 1 Ld. Raym. 378-9. *Jones v. Baker*, 7 Cowen, 445. *Hutchins v. Hutchins*, 7 Hill, 107. *Kirtley v. Deck*, 2 Munf. 22.

In a criminal prosecution for a conspiracy, the conspiracy is the criminal act for which the defendant is to be punished, and the indictment will lie although no act has been done in

pursuance of the unlawful combination. The allegation of acts injurious to individuals or to the public, is only an allegation in aggravation of the offense. *Rex v. Edwards et al.*, 8 Mod. 320. *King v. De Berenger*, 3 Maule & Selw. 68. *The King v. Gill & Henry*, 2 Barnw. & Alder. 204. *The State v. Buchanan et al.*, 5 Har. & John. 352. *The State v. Cawood et al.*, 2 Stew. 363.

In a civil action on the case for a conspiracy, the gist of the action is the damage which the plaintiff has sustained by the acts of the defendants, and the allegation of a conspiracy need not be proved. 1 Saund. 230, note 4. *Laville v. Roberts*, 1 Ld. Raym. 378. *Sheple & Warner v. Page*, 12 Verm. Rep. 533. In *Hutchins v. Hutchins*, 7 Hill, 107, it is said: "The conspiracy or combination is nothing, so far as sustaining the action goes; the foundation of it being the actual damage done to the party." It is upon this ground only that those cases rest, which allow a recovery against one defendant when the others are acquitted.

As it is the settled law that, in an action on the case in the nature of a writ of conspiracy, the plaintiff may have judgment against one defendant, although he may have no cause of action against the others, we are assisted in determining the character of the case which will support such action; and the conclusion would seem to be unavoidable, that the action can only be sustained against several, where the acts complained of would sustain an action against one of the defendants; in other words, that the number of the defendants sued, and the allegation that they conspired together, do not authorize the plaintiff to maintain his action, when he could not maintain it against one defendant, if sued alone. In *Wellington v. Small et al.*, 3 Cushing, 149, it is said by the Supreme Court of Massachusetts, "As to the first of these averments, (that there was a conspiracy,) it may be remarked that, if an act is done by one alone, which is no cause of action, a like act is not rendered actionable by being done in pursuance of a conspiracy. In an action on the case in the nature of a conspi-

racy, the gist of the action is not the conspiracy, (as it is in an indictment, and was in the old writ of conspiracy,) but the damage done to the plaintiff." The only use in charging the conspiracy is, to make the defendants responsible for the acts of each other, done in pursuance of the common design.

In the present case, it is alleged that the object of the conspiracy was to injure the plaintiff in his business. I lay out of view the expletives in the petition of "impoverishing and ruining the plaintiff," for the degree of injury designed and effected has nothing to do with the question, whether the petition states a cause of action. It is also alleged that the defendants, in the acts which were designed to effect their object, were influenced by malice toward the plaintiff. The important allegation in determining whether this action will lie, is that which states the acts of the defendants, which were intended to effect their object. The act charged is, that they refused to take insurance upon the plaintiff's boat.

Now it is believed to be beyond controversy that each of the defendants might have declined to take any insurance on the plaintiff's boat, and that, too, from hatred and malice towards the plaintiff, and such individual would not have been liable to an action for such refusal. Nor is it supposed to be less clear that the whole of the defendants might, without combination with each other, have refused the insurance, and none of them would have been subject to an action. If, then, the action can be maintained, it must be on the ground that the defendants have agreed, among themselves, that each would take no insurance on the plaintiff's boat, and thereby he was injured. If this fact will sustain the action, it must be because the conspiracy itself is an important part of the cause of action. Yet it is clear, from authority, that the conspiracy need not be proved, and that it is not the ground of the action.

It is argued here that the conspiracy of the defendants was to injure the plaintiff in his lawful business, and although such injury was effected by conduct not in itself illegal, yet the defendants are responsible for an injury done to the plaintiff by

their acts, because they were used for an unlawful end. Some expressions have been quoted from the opinions of judges to sustain this position. A single sentence in the charge delivered by Judge Burnside to the jury, when sitting at *nisi prius*, in the case of *Hinchman v. Ritchie*, Brightly's Rep. 159, has been quoted. The judge says: "So a conspiracy to do a lawful act, if for an unlawful end, is indictable." The next sentence in the charge is in these words: "Where men combine and conspire to do an *unlawful* act, which oppresses another or unjustly subjects him to the power of those confederating, it gives effect to their purpose, either of extortion or mischief; such conspiracy affords a civil remedy for damages by an action on the case. In general, there must be a common design to do an *unlawful* act."

It appears by an examination of the cases that, to render the parties to a conspiracy liable to a civil action, the acts which they agree to do must be unlawful. In *Mott v. Danforth*, 6 Watts, 306, it is said, that an action on the case lies wherever the plaintiff is aggrieved and damnified by *unlawful acts* done by the defendants, in pursuance of a combination and conspiracy for that purpose. In *Jones v. Baker*, it is said: "The plaintiff showed damage, and if it resulted from the *wrongful acts* of the defendants, or either of them, he was entitled to recover." In *Adams et al., v. Paige et al.*, 7 Pick. 550, it is said: "It is not necessary, to maintain an action on the case, that there should be any moral turpitude in the act complained of. It lies wherever a damage is occasioned by a *wrong done*." In *Gregory v. The Duke of Brunswick*, 47 Eng. Com. L. R. 281, Carr. & Kir. 30, Chief Justice Tindall held that, although persons attending the theatre had a right to express their free and unbiased opinions on the merits of actors, yet they had no right to go there upon a preconcerted plan to make such a noise that a particular actor, without regard to the merits of his performance, should be driven from the stage, and that, for damages resulting to plaintiff, from such acts, the defendants were liable in an action on

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the case. The acts in that case were beyond the license which the attendants upon the theatre possessed, and were consequently unlawful. The same case was before the court on a motion for a new trial, in 6 Mann. & Granger, 46 Eng. Com. L. R. 963, and it was held that the direction of the chief justice, given to the jury, was correct.

There are *dicta* in some of the cases to the effect that a civil action may be maintained for damages resulting from a conspiracy, where no act has been done in pursuance of the agreement. In *Patten et al., v. Gurney et al.*, 17 Mass. 186, the Chief Justice, in delivering the opinion of the court, says: "If the fraud is actually committed, it is not necessary to allege a conspiracy, which is, of itself, a criminal act, and may be indicted or *sued for*, although the act intended to be done is left unexecuted, provided any damage happen in consequence of the conspiracy." In *Haldeman v. Martin*, 10 Barr, 372, the Chief Justice says: "A conspiracy to do an illegal thing is actionable, if injury proceed from it." Now it is not consistent with the authorities, that an action can be maintained for a conspiracy, without any act to carry out its object, and it is not readily perceived that damage could result to a plaintiff from a mere agreement of defendants to do certain acts which they never attempted.

In the present case, the act charged upon the defendants, as having been done by preconcert, was an act which each and every one of the defendants had a right to do, and was no violation of any right which the plaintiff could claim under the law. He had no right in law to demand insurance upon his boat from one or all of the defendants, nor that they should insure cargo upon his boat, and, consequently, their refusal to insure, from any motive, however improper, could give him no right to sue them. The moment it is established that the conspiracy is not a substantial ground of action, it follows that no action can be brought to recover damages for the joint act of several, unless the act itself is illegal.

This is a case in which the plaintiff alleges that he has suf-

ferred great injury from the conduct of the defendants, but if the injury results from an exercise of their legal rights, he has no redress. While the law professes to redress every injury sustained by the citizen, by the violation of any of his rights, it cannot, for his benefit, violate the rights of others. There are very many cases in which individuals sustain damage by the acts of others, when such acts are consistent with law. In such cases, the law furnishes no compensation for the damages sustained. If an individual was known to be under an engagement to furnish a large quantity of any article, in a short time, at a stipulated price, and others, from hostility to him, should purchase all of the article in the market, and refuse to sell to him except at a ruinous price, so that he could not comply with his engagement, it would be difficult to find any principle upon which he could maintain an action against them, and recover the damage he had sustained in consequence of failing to comply with his contract. Although his ruin might be the consequence, he must bear it. In the present case, taking the petition to be true, as we must upon the demurrer, the plaintiff has sustained great damage by the conduct of the defendants, but, unless we are prepared to say that he had a right to demand that insurance should be taken on his boat, we can find no violation of any of his legal rights.

The judgment on the demurrer is affirmed.

THE STATE, Respondent, *vs.* HAM, Appellant.

1. A reservation from sale, by the act of congress, of March 3, 1811, of land claimed before the board of commissioners, was not a disposition of the land, within the meaning of the first clause of the sixth section of the act of March 6, 1820, so as to prevent the same, when designated as a sixteenth section, from passing to the state for the use of schools.
2. The act of March 6, 1820, the ordinance of July 19, 1820, declaring the assent of the people of Missouri to the conditions contained in said act, and the designation of a sixteenth section, vest in the state, for the use of schools, a complete title to land so designated, unless the title had previously passed out of the United States.

3. So, the title of the state, to land designated as a sixteenth section, is superior to a subsequent confirmation, by special act of congress, of a Spanish claim, notice of which had been duly filed with the recorder of land titles; especially when the confirmation professes to be nothing more than a relinquishment of the title remaining in the United States.

Appeal from St. François Circuit Court.

The appellant was indicted in November, 1851, under the thirtieth section of the act entitled "an act to regulate the sale of the sixteenth sections," (R. C. 1845, p. 994,) and the thirty-first section of the ninth article of the act concerning crimes and punishments, (R. C. 1845,) for trespassing upon section sixteen of congressional township thirty-four, range seven east, claimed as school land belonging to the inhabitants of said township. The indictment contained two counts. The first count charged the defendant with cutting down and destroying trees and crops. The second count charged him with cutting timber and quarrying rock. Plea, "not guilty."

At the trial, the state offered in evidence a survey of the sixteenth section by the county surveyor, made in the cause by order of the court. It was proved that the defendant had cut timber on the land included in said survey, within the time laid in the indictment. No other survey of the sixteenth section was given in evidence.

The defendant, in justification, exhibited the following evidences of title in Thomas Fleming, whose tenant he was admitted to be:

1. A petition, dated Ste. Genevieve, October 15, 1800, from Jean Bte. Vallé, Francis Vallé, St. Gemme Beauvais, and J. Bte. Pratte, to Don Carlos Dehault Delassus, lieutenant governor of Upper Louisiana, praying for a grant of two leagues square of land adjoining the Mine la Motte lead mine, owned and worked by them, to enable them to procure the timber and materials necessary to carry on the mine.

2. The reply of the lieutenant governor, dated January 22, 1801, stating that it was out of his power to make a grant of

the extent prayed for, referring the petitioners to the intendant general at New Orleans, and granting them temporary permission to cut wood on the land.

3. A power of attorney from the petitioners to Don Jacques Maxwell, dated March 9, 1802, to ask for a concession from the intendant general in their names.

4. A letter from Maxwell to the intendant general, dated New Orleans, April 29, 1802, asking a concession, as prayed for in the petition to the lieutenant governor, upon which was endorsed the following order, signed by Morales, the intendant, and dated November 30, 1802: "Let the documents presented be accompanied by a translation thereof in the Castilian language, by the interpreter, Don Pedro Derbigny, and when this is done, let the same be seen by the fiscal agent."

5. Plat of a survey by Nathaniel Cook, deputy surveyor of the district of Ste. Genevieve, of 28,224 arpens, or 24,142 acres, including Mine la Motte, certified under date of February 22, 1806, as surveyed for J. Bte. and Francis Vallé, Beauvais and Pratte, "by virtue of a concession granted them by Don Carlos Dehault Delassus, bearing date January 22, 1801."

All the foregoing documents were filed in the office of the United States recorder of land titles, in February, 1806, by the Vallés, Pratte and Beauvais, as the foundation of their claim to a confirmation.

6. Proceedings of the first board of commissioners upon the claim of J. B. & F. Vallé, Pratte and Beauvais, for a confirmation of two leagues square at Mine la Motte. The board rejected the claim December 27, 1811.

7. An act of congress, approved May 24, 1828, entitled "An act confirming to Francis Vallé, Jean Bte. Vallé, Jean Bte. Pratte and St. James Beauvais, or to their heirs or legal representatives, of the county of Madison, in the state of Missouri, certain lands."

8. Official survey No. 2963, of the Mine la Motte tract, confirmed by the act of May 24, 1828.

9. A patent pursuant to the act from the United States to the legal representatives of the original proprietors, for the land embraced in survey 2963, saving the rights of third parties, in the words of the act. The patent was dated March 25, 1839.

10. All the title of the patentees of the Mine la Motte tract was admitted to be in Thomas Fleming, and the sixteenth section upon which the trespass was committed, was admitted to be within the lines of survey No. 2963.

The court below, at the instance of the state, gave the following instructions, to which the defendant excepted :

1. The act of congress of March 6th, 1820, entitled "An act to authorize the people of the Missouri territory to form a constitution and state government, &c., taken in connection with an ordinance declaring the assent thereto of the people of the state of Missouri, by their representatives in convention assembled, passed on the 19th of July, 1820, operated as a grant by congress to the state of Missouri, for the use of schools, of the sixteenth section in controversy, unless such sixteenth section had been previously disposed of by government.

2. Although the land claimed by the proprietors of Mine la Motte, by the several acts of congress in that behalf; was reserved from sale by the government, and although the survey of said claim includes and covers the sixteenth section in controversy, yet such reservation is not such a disposition of said section by the government, within the saving clause of said act, and cannot operate to prevent the title vesting in the state, by virtue of said grant.

3. And if the jury believe from the evidence, that the defendant was cultivating any part of the section, as described in the indictment, or committed any waste or injury to the said land, within one year from the finding of the said indictment, they must find him guilty, and assess a fine not exceeding five hundred dollars.

The following, among other instructions asked by the defendant, was refused :

“ If the jury believe that the defendant went into possession of the land in question, under a lease from Fleming, believing that Fleming had a good title, and that he occupied the land in good faith, then he was not a trespasser, subject to be indicted.”

The defendant was found guilty, and his fine assessed at four hundred dollars. He filed his motions for a new trial and in arrest of judgment, which being overruled, he appealed to this court. The cause was argued in this court at the October term, 1852, and an opinion filed at the March term, 1853. At the same term, a motion for a rehearing was filed, which was held under advisement until the March term, 1854, when the motion was overruled, and the opinion which is published was filed. The following abstract of points, made by the appellant's counsel, includes those made in the motion for a rehearing, as well as on the original argument.

Thomas T. Gantt, for appellant. 1. The ground embraced within the lines of the survey made by Cook, which was filed with the recorder as evidence of the extent of the claim of Vallé and others before the old board, was by the acts of March 3, 1811, and February 17, 1818, reserved from sale or other disposition, until the final action of congress on the claim. This final action was had in May, 1828, when the land was granted to Vallé and others. The title then granted had relation to March 3, 1811, and defeated all titles having inception in the interval. 2. The act of March 6, 1820, contained no words of present grant. Before a complete title could vest in the state, it was necessary at least that there should be a survey designating the sixteenth section, and the record does not show that any such survey has ever been made by the United States. While the title of the state was thus incomplete, a complete grant was made to the lessors of the appellant. *Barry v. Gamble*, 8 Mo. Rep. 88. 3. It is not questioned that

congress had *power* to dispose of, by grant or otherwise, land which had been reserved by the acts of 1811 and 1818, but it is denied that they have, by the language of the act of March 6, 1820, manifested any *intention* to do so. An intention to grant land reserved to satisfy a private claim, in open disregard of the reservation, and *in violation of recognized right*, ought not to be imputed to congress, unless such land clearly comes within the terms of the act, which it does not, because, 4. There was no authority by law for the survey by the surveyor general of the land claimed by Vallé and others, by sectional and township lines. The first section of the act of congress of April 29, 1816, (2 U. S. S. at large, p. 325,) directs that officer to survey the public lands, and *also* to survey the lands claimed by private claimants, and then *or thereafter* confirmed, and transmit plats to the commissioner of the general land office. The surveyor had no authority to survey private claims, whether confirmed or not, by township and sectional lines, and so there could be no legal designation of a sixteenth section within the survey made by Cook. The act of March 6, 1820, should only be taken to refer to a sixteenth section which has a *legal* existence. Besides this, the words "otherwise disposed of," in the act itself are sufficient to protect land reserved to satisfy private claims from the operation of the act. It will scarcely be contended but that, if the *locus* of the sixteenth section, in any township, had been at the date of the act, reserved for military purposes, the schools would have been put to their election of equivalent lands "elsewhere; and yet, if a reservation for any purpose protected the land from the operation of the act, it is difficult to deny that effect to the reservation created by the acts of 1811 and 1818. By the reservation the land was "disposed of"—it was set apart to the satisfaction of a private claim. It is an argument in favor of this construction that it satisfies, on the part of the government of the United States, every demand of the strictest good faith towards the state of Missouri, and also towards the private claimant. The act gives to the schools land of equal

value, if the sixteenth section has been otherwise appropriated. But if the land of the private claimant is taken for the schools, he has no remedy. The case of *Hammond v. The Schools*, (8 Mo. 65,) has been referred to, as showing that a reservation to the use of schools by the act of 1812, did not prevent congress from granting the land reserved. It is submitted that the confirmation, in 1816, was evidence that the land was rightfully claimed by an individual, and so *not reserved* by the act of 1812, which only reserved lands not rightfully claimed by individuals. 5. The court erred in refusing to instruct the jury that if the defendant entered upon the land in good faith, under a grant from congress, he was not liable to a criminal prosecution. 6. The judgment should have been arrested for the insufficiency of the indictment. Upon the whole case, the following authorities are cited: Acts of Congress of March 3, 1811, April 29, 1816, February 17, 1818, March 3, 1819, March 6, 1820, and May 25, 1828. *Delassus v. The United States*, 9 Pet. 130. *Mackay v. Dillon*, 4 Howard, 420. *Bissell v. Penrose*, 8 Howard, 317. *Delauriere v. Emerson*, 15 Howard, 525. *McCabe v. Worthington*, 15 Howard. *Foley v. Harrison*, 15 Howard, 447.

J. R. Lackland, for the state. There is no evidence shown by the record that the parties under whom defendant claims ever acquired any title from the Spanish government. Their title only dates back to May 24, 1828, before which time, the United States had parted with the title by virtue of the act of March 6, 1820, and the ordinance of the state of Missouri of July 19, 1820, accepting the propositions contained in said act. In *Delauriere v. Emerson*, 14 Mo. Rep. 37, it was held that the title of the state, under the second subdivision of the act of March 6, 1820, was superior to a confirmation of a complete Spanish grant, by the act of July 4, 1836. The state here claims under the first subdivision of the same section. Admitting, therefore, that the defendant here has shown as good a title as that of *Delauriere*, the title of the state must prevail. Supposing that those under whom defendant claims had

such an inchoate title as that the land was reserved from sale by the acts of March 3, 1811, and February 17, 1818, still this did not divest congress of the power to make a different disposition of the land, as they did by the act of 1820. *Burgess v. Gray*, 15 Mo. Rep. 223. *Hammond v. The Schools*, 8 Mo. 74-5. *Waller & Smith v. Von Phul*, 14 Mo. Rep. 87. A mere reservation of the land from sale was not "a sale or other disposition" of it, so as to except it from the operation of the act of March 6, 1820. The act of May 24, 1828, under which defendant claims, contains conditions and reservations similar to those contained in the second section of the act of July 4, 1836.

GAMBLE, Judge, delivered the opinion of the court.

As the appellant, upon an application for a rehearing, has made some points which were not alluded to in the original opinion, it has been thought advisable to remodel the opinion so as to embrace those points, rather than have a separate opinion upon the motion for a rehearing published.

The case presents a conflict between a title in the state, for the benefit of the inhabitants of township thirty-four, range seven east, and a title set up under a private act of congress, passed on the 24th of May, 1828, confirming to François Vallé and others, the Mine la Motte tract of two leagues square. The land in dispute is the sixteenth section, and is comprehended in the survey of the claim of Vallé and others.

The sixth section of the act of congress of the 6th March, 1820, proposed to the convention which was to assemble for the purpose of forming a constitution for the state of Missouri, the terms of a compact to be entered into between the United States and the state of Missouri, declaring that the propositions, if accepted, should be obligatory upon the United States. The first proposition is in these words: "that section number sixteen, in every township, and when such section has been sold or otherwise disposed of, other lands equivalent there-

to, and as contiguous as may be, shall be granted to the state, for the use of the inhabitants of such township, for the use of schools." The condition upon which the government of the United States was to be bound by the propositions made in the act of congress was, that the convention should provide by an irrevocable ordinance, that land sold by the United States after the 1st January, 1821, should be exempt from taxation for five years after the sale, and that land granted as bounty land, for military services during the war with England, should, while owned by the patentees or their heirs, be exempt from taxation for three years from the date of the patents.

The propositions thus made were accepted by the state, and an ordinance was passed on the 19th July, 1820, declaring the assent of the state to the condition prescribed in the act of congress. These acts constitute the title relied upon by the state in the present case.

The defendant gave in evidence a transcript from the office of the recorder of land titles, by which it appeared that J. B. Vallé, Francis Vallé and others filed a claim with the recorder for two leagues square of land, and that the claim was founded upon a petition to the lieutenant governor for a concession, a recommendation of the petition by the lieutenant governor to the intendant general, and a provisional permission by the lieutenant governor to cut timber on the land for the use of their mines. There was also filed a survey of the claim, made in the year 1806. This claim was rejected by the board of commissioners in 1811. It was confirmed by private act of the 24th May, 1828, according to the survey made in 1806, but with a proviso in these words: "That this confirmation shall extend only to a relinquishment of title on the part of the United States, nor prejudice the rights of third persons, nor any title heretofore derived from the United States, either by purchase or donation." It was admitted that the title under this confirmation was in one Fleming, and that the defendant, Ham, claimed and occupied as his tenant.

It appears to have been assumed throughout the trial of the

case, that the United States survey of the district into townships and sections, had been made before the confirmation to Vallé and others, as no question was made in relation to such survey. The land is spoken of through the whole record as the sixteenth section, which, with us, is a designation only applied to land surveyed into sections by the United States, and such survey would not have been made after the confirmation.

Unless this sixteenth section had been "sold or otherwise disposed of," at the time the state of Missouri acceded to the terms of the compact proposed in the act of 6th March, 1820, the title to it became vested in the state, as soon as it was designated as a sixteenth section, if the language of that act was sufficient to transfer the title. The state, by the compact, became a purchaser of the land, although it was for the benefit of the inhabitants of the township; and the consideration she paid was the relinquishment of her right to tax lands within her limits, sold by the United States, for five years after such sale, by which the value of the lands of the United States was enhanced. Now, the chief objection made to the title of the state is, not that the United States had sold the land to any person, nor that the title had been, in any other manner, or for any other consideration, passed to any third party, at the date of the compact between the United States and the state of Missouri; but that, at that period, it had been, under acts of congress, reserved from sale, and was, therefore, "disposed of" within the meaning of the exception in the compact.

It cannot be doubted that it was competent for the United States to convey the title to the land which had been reserved from sale. This court, in *Hammond v. The Public Schools*, 8 Mo. Rep. 74, held, that the reservation of the lots mentioned in the second section of the act of congress of 13th June, 1812, for the use of schools in the several towns named in the act, did not prevent the congress of the United States from passing the title to one of such lots to an individual. That reservation, by its terms, was a permanent reservation. The reservation insisted on in the present case, is claimed under

the proviso to the tenth section of the act of 3d March, 1811, and was only a reservation from sale, of land claimed before the board of commissioners," until the final action of congress thereon." It conferred no right; it acknowledged no right. It imposed no obligation upon the government. It was simply a direction to its officers to refrain from selling land covered by claims, which had been filed according to law for adjudication. A sale by the executive officers of the government, contrary to the reservation, would be, if not protected by subsequent legislation, merely void. *Stoddard v. Chambers*, 2 Howard's Rep. 313. *Mills v. Stoddard*, 8 Howard's Rep. 345. *Bissell v. Penrose*, ib. 317. But the title to the land being still in the United States, could be passed by the government to any person, for any consideration, notwithstanding the reservation.

We are brought to the examination of the terms of the compact, to see whether, upon a reasonable construction, they embrace the land in controversy and pass the title thereto to the state.

It has been objected to the title set up by the state, that the words employed in the proposition by congress do not profess to transmit the title by their own force, but look to some act which is to have that effect. They are "section sixteen in every township *shall be granted*." It is to be remembered that the proposition was made in an act passed March 6, and was to be accepted or rejected by the convention which was to assemble in June following, and therefore the proposition could not be otherwise expressed than in language looking to the future. When the state of Missouri subsequently expressed its consent to the terms proposed, and passed the ordinance exempting the land sold by the United States, and that granted for bounties to soldiers, from taxation, the compact was complete between the sovereignties, and no conveyance was needed to pass the title from the United States to the state, for any tract of land that then was or thereafter might be regularly designated as a sixteenth section. Such has been the action of

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the two parties under the contract, as they framed it. No person ever heard of a patent from the United States to the state for a sixteenth section. The titles which have been acquired by individuals to sixteenth sections, sold under laws of the state, need no further grant from the United States to make them complete legal titles.

It is objected that, as this land was reserved from sale on account of the claim of Vallé and others filed with the recorder of land titles, there was no authority for surveying it into sections, and consequently there could be no legal designation of the tract in controversy as a sixteenth section, so as to allow it to be claimed by the state. In support of this position, reference is made to the act of April 29, 1816, (3 U. S. S. 325,) as requiring the surveyor to survey the lands embraced in private claims, thereby distinguishing them from the public lands, which he is required to survey under the direction of the president.

This act provides for the appointment of a surveyor of the lands of the United States in the territories of Illinois and Missouri, and makes it his duty to survey and divide so much of the lands of the United States as the president shall direct, in the manner in which the surveyor general is authorized and directed to do, in relation to the same or the lands lying northwest of the river Ohio; and also to survey the lands in the said territories, the claims to which have been or may hereafter be confirmed by any act of congress.

The only authority in this act for the survey of a private claim is, after it has been confirmed, and it may as well be stated at once, that no act of congress ever authorized a public survey of any unconfirmed Spanish claim. The act of 28th February, 1806, (2 U. S. S. 352,) authorized the principal deputy surveyor to cause such surveys to be executed as he might be directed to execute, by the commissioners appointed to ascertain the titles and claims to lands in the territory, but the second proviso to the third section of the act expressly declares

that all such surveys, and all other surveys, except those of *legal and complete titles*, should be held and considered as private surveys only. The Supreme Court of the United States, in *Mackay v. Dillon*, 4 Howard, 447, declared the survey of the St. Louis commons, made in 1806, in the same year in which Vallé's claim was surveyed, to be only a private survey.

There was then no survey of the claim of Vallé and others, which the surveyor in Missouri could recognize ; none which was binding upon the United States. When he contracted with his deputy for surveying a district in which this and other unconfirmed claims were located, the deputy must either survey the land included in such claims into sections and quarter sections, or he must run the exterior lines of the claims, and divide the adjoining lands into fractional sections and fractional quarter sections. No warrant is to be found, either in the laws or the practice of the government, for surveying the lands adjoining an unconfirmed claim into fractions. The lands included within such claims were still the lands of the United States. There are now a great many of such claims still unconfirmed. Many of them have never been bounded even by private surveys, and of those which have, the location of many is, doubtless, unknown to the surveyor by any evidence in his office. The practice of surveying the land covered by such claims into sections, instead of treating it as included in a public survey that would authorize the division of the adjacent land into fractions, was undoubtedly correct under the laws of the United States.

It is insisted that, although the reservation of the land included within Vallé's claim, did not divest the government of the title, and was not a "disposition" of the land, in the general sense of that term, still the compact ought to be so construed as to give to the state a right to equivalent land, and therefore leave the claim of Vallé and others unaffected. The proposition in the act of 1820 is, to grant the sixteenth section

in every township, "*and when such section has been sold or otherwise disposed of,*" other lands equivalent thereto. It is hard to find any warrant for such construction of the language here employed, as is insisted upon. It is the agreement of the parties that a particular section in each township shall be devoted to the use of schools, and one party is to take the title to that section for that purpose. It may be the best section in the township; it may be the worst; but it is chiefly selected because it is central. The individuals to be benefitted by the grant are the inhabitants of the township, whose children are to be educated there by means of the grant. It is agreed between the parties that, if the United States had previously sold or otherwise disposed of that section, then the state should take equivalent lands, as contiguous as might be, for the use of the inhabitants of the township. This stipulation was not intended to reserve to the United States a right to sell or dispose of the sixteenth section in the future, and then to offer an equivalent in lands, but as there had been not only sales, but confirmations and donations of land, previously made in Missouri, this clause was to secure an equivalent for sixteenth sections, which might have been so disposed of. It is evident that there was present to the mind of congress, in framing the act of 1820, the idea that there were claims which had been confirmed, and other claims which would probably thereafter be confirmed; for, in the second proposition made to the state and accepted, there is a grant of twelve salt springs, with six sections adjacent to each, to be selected by the legislature, but with the proviso "*that no salt spring, the right whereof now is, or hereafter shall be, confirmed or adjudged to any individual or individuals, shall, by this section, be granted to the state.*" Here is a provision made, not only to secure those who already had confirmations for salt springs, from any interference by the state, but a right is reserved to confirm claims in the future, and if the state chooses to select any salt spring that is claimed by an individual, the title of the state will be

divested by the confirmation of such claim. While this protection is afforded to unconfirmed claims to salt springs, no such stipulation is made in relation to any unconfirmed claim to a sixteenth section. No right is reserved to the United States to confirm such claim in the future. As soon as there has been a survey of land into townships, and a designation of sixteenth sections, the only question of title is the question whether the United States owns the land. If the title is in the government, no subsequent act can affect the right of the state, holding for the use of the inhabitants of the township.

The foregoing, it is believed, would be the law of this case, if there had been an unconditional and unqualified confirmation of the Spanish claim. But, in the present case, it is apparent, on the face of the confirmation to Vallé and others, that they can claim no otherwise than the United States could claim this land, if there never had been a confirmation, and the claim of Vallé and others had been annihilated. They hold only a relinquishment of title from the United States, which it is declared, "shall not prejudice any title heretofore derived from the United States by purchase or donation." It can scarcely be doubted that the state, holding for the inhabitants of the township, is entitled to this land as against the United States, and that title is older than the confirmation. If the United States had so parted with, or affected the title to this land prior to the confirmation, that it could not be reclaimed by the government, then persons claiming under the confirmation, which is but a mere relinquishment of title on the part of the United States, without prejudice to any previous title by purchase or donation, cannot claim it. In *Barry v. Gamble*, 3 Howard, 55, the clause in the second section of the act of the 24th May, 1828, (4 U. S. S. 298,) which is just like the proviso in the special act in this case, is declared to have the effect of giving a preference to the titles intended to be protected by that clause, over the titles derived from the confirmations authorized by the act. The title, then, of the state by the act

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of 1820, and the designation of the sixteenth section, is, in our judgment, superior to the title set up under the confirmation to Vallé and others.

We have looked into the objections made to the indictment, on the motion in arrest of judgment, and think the motion properly overruled. The judgment is affirmed.

THE STATE, Respondent, *vs.* FLEMING, Appellant.

1. In an action by the state to recover a sixteenth section, the production of a survey is not necessary, where the answer sufficiently admits that the land claimed has been designated as a sixteenth section.
2. The statute of limitations does not run against the state.

Appeal from St. François Circuit Court.

These were two actions brought in the name of the state of Missouri, to the use of the inhabitants of township thirty-four north, range seven east. One was an action in the nature of ejectment. The petition stated that on a certain day, the plaintiff was entitled to the possession of section sixteen in said township, and that the defendants afterwards entered into the said premises and unlawfully withheld from the plaintiff the possession thereof. The answer denied that the defendants unlawfully withheld the possession, and alleged that the title to said section sixteen was in Thomas Fleming, under whom they held. The other action was for the rents and profits. Thomas Fleming was subsequently admitted as sole defendant in both actions. On the trial, the plaintiff read in evidence the act of congress of March 6, 1820, and the ordinance of the people of Missouri of July 19, 1820, and proved by a witness that the land in controversy was the sixteenth section, to the admission of which last evidence the defendant excepted, on the ground that a survey was the only competent evidence. The defendant then exhibited the evidences of title, which are set

out in the preceding case of *The State v. Ham*. Evidence was also offered tending to show that defendant and those under whom he claimed, had been in possession of the land since 1806. There was a judgment for the plaintiff in each case, from which the defendant appealed.

T. T. Gantt, for appellant.

Frissell & McCracken, for respondent.

GAMBLE, Judge, delivered the opinion of the court.

1. In these cases, the individuals who were actually in the occupancy of the land, were the defendants originally sued. They appeared and filed their answers, in which they recognize the land in dispute to be section sixteen, in township thirty-four north, range seven east, as stated in the petition. Their answers assert that the title to said section sixteen is in Thomas Fleming, who is their landlord. Thomas Fleming, as landlord, is admitted to defend, and the action, as to the original defendants, is dismissed and discharged. Fleming admits himself in possession, but files no answer, and must, therefore, be taken to have adopted the answer filed by his tenants, who were the original defendants. The manner in which the land is described in the petition and answer sufficiently admits upon the record that it had, in the mode known to the law, been designated as a sixteenth section. There was, in such state of the pleadings, no necessity for the production of the original survey of the township and section, to show that this was the sixteenth section in that township.

2. The questions which have been considered and decided in the case of the *State v. Ham*, are the same that are presented in these cases, and the opinion in that case must govern in these. In addition, however, to the questions decided in that case, the defendant here insists upon the bar by the limitation of twenty years. The grant is to the state, for the use of the inhabitants of the different townships, and these actions are brought in the name of the state, because the title

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to the property is still in her. Until there is a corporate organization, under the laws of Missouri, and the title to the land vested in such corporation, there is no other body but the state capable of maintaining an action for the possession of the property, or for injuries done to it. While such continues to be the case, there is no right of action in any individual or any subordinate corporation, against which the statute can run, for it is beyond question, that until there is some person in being, capable of maintaining a suit, the statute does not begin to run. If the state can alone sue, then the maxim *nullum tempus occurrit reipublicæ* applies, and furnishes an answer to the plea of the statute.

Referring to the opinion in the case of the *State v. Ham*, for the views of the court upon the principal questions in these cases, the judgments herein are, with the concurrence of the other judges, affirmed.

THE ST. LOUIS HOSPITAL ASSOCIATION, Respondent, vs. WILLIAMS' ADMINISTRATOR, Appellant.

1. Under the fourth section of the act concerning wills, (R. C. 1845,) a mark is a sufficient signing by the testator, notwithstanding he was able to write.
2. But if, in addition to the mark, the testator's name is signed to the will by another, *at his request*, the will is void, unless the person who writes the testator's name signs his own name as a witness, and states that he subscribed the testator's name, at his request, as required by the fifth section of the act. (*McGee v. Porter*, 14 Mo. Rep. 611, affirmed.)
3. The supreme court will not infer one fact from other facts found by the court below.
4. A devise to a corporation will not be avoided by an immaterial variation in the name.

Appeal from St. Louis Circuit Court.

Barton Bates, for appellant. 1. The fifth section of the act of 1845, concerning "Wills," (R. C. 1845,) required that the witness to this will, who wrote the testator's name, should have stated that he subscribed the testator's name at his

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request; and without that statement, the paper was void as a will. *McGee v. Porter*, 14 Mo. Rep. 611. The making of a mark was not of itself a sufficient signing. The law requires that the testators's name shall appear to the will, and it provides for those cases in which the testator is not able to sign himself, by allowing his signature to be made by another at his verbal request; but imposes upon the agent the duty of stating that he did so write the name. 2. The plaintiff cannot claim the devise, which was to the St. Louis Hospital. A corporation can only be known by its corporate name.

A. P. & P. B. Garesché, for respondent. 1. A mark is a sufficient signing by the testator within the meaning of the fourth section of the act concerning wills. 2. Greenleaf's Ev. §674. 1 Powell on Devises, 78. 5 Johns. 144. 3 Curteis, (7 Eng. Ecc. Rep. 752.) 3 Nev. & Per. Rep. 228. 8 Adol. & Ellis, 94. 1 Jarman on Wills, 111. 2. The will having been sufficiently signed by the testator himself, it was not necessary to follow the directions of the fifth section, which is only applicable to a case where the testator does not sign himself. *Butler v. Benson*, 1 Barb. S. C. Rep. 526. 4 Harr. (Del.) 350. 2 ib. 448. In the case of *McGee v. Porter*, 14 Mo. Rep. 611, there was no signing by the testator himself. 3 Strobhart's (S. C.) Rep. 297. 1 Jarman on Wills, 189. 3. A corporation need not be described by its corporate name, if the corporation intended can be precisely ascertained. Parol testimony is admissible to correct improper description of person in devises. Roper on Legacies, (1st Am. from 3d Lond. ed.) pp. 132 *et seq.* and cases there cited. 1 Powell on Devises, p. 99, 283, marginal, 337, 483.

SCOTT, Judge, delivered the opinion of the court.

This was a proceeding in the Circuit Court of St. Louis county, under the 31st section of the act respecting wills, in order to establish the will of John Williams, which had been offered for probate by the respondent, and been rejected. The

will was made on the 9th day of June, 1849, and was presented for probate and rejected the 13th day of the same month, in the same year.

The will was authenticated in this manner :

his
"JOHN + WILLIAMS,"
mark.

and was attested by two subscribing witnesses, as is required by the fourth section of the act concerning wills. Neither of the subscribing witnesses, in his attestation of the will, stated that he subscribed the testator's name, at his request, in pursuance to the requisition of the fifth section of the act. The trial of the cause was by the court, whose finding, as to the material facts involved in this controversy, was as follows : "That the paper dated June 9th, 1849, offered for proof, as the will of John Williams, was written by P. B. Garesché, at the request of said Williams ; that said Williams, being sick, was unable to sit up so as to write his name, and said Garesché then wrote the words or name, "John Williams," at the bottom of the will, and said Williams made his mark between the words "John" and "Williams," and acknowledged the mark as his signature, and published and declared the paper, so signed, as and for his last will and testament." The finding continues, and shows that the will was attested and authenticated, as is required by the fourth section of the act respecting wills. The court found for the Hospital Association, and established the will, from which an appeal was taken to this court.

The arguments for the will show that it is sought to be established, on the ground that the writing of the name of the testator to his will was unauthorized ; that he designed authenticating it by his mark alone, and such being the case, it is a good will under the fourth section of the act.

The essential words of our act correspond with these of the statute of 29 Chas. II., which relate to wills, the received construction of which is, that a mark is a sufficient signing, and

that, notwithstanding the testator was able to write : 1 Jarman, 69. But when a will is authenticated, apparently both by a mark and the name of the testator, our statute makes it material to ascertain whether the testator's name was put to the will by his direction. It is not necessary that there should be an express direction. A direction may be proved by circumstances. The finding of the court is silent as to this material fact. It either did or did not exist. The judgment of the court (being for the will,) would warrant the inference that, in its mind, there was no direction of the testator to put his name to the will, or, in other words, that the act was unauthorized. We are of the opinion, that the conclusion should have been drawn from the facts existing, whether the act of signing the testator's name was authorized by him or not. It should have been found one way or the other by the court trying the cause. In reviewing the law of a case, on the facts found, it is not the province of this court, from one or more facts, as found, to deduce the existence of another fact. This judgment, then, must be reversed, in order that it may be found whether the name of the testator was written to his will by his direction.

If the name of the testator was written to the will by his direction, the case of *McGee v. Porter*, 14 Mo. Rep. 611, is decisive that the provision of the fifth section of the act is imperative, and a failure to comply with it will render the will inoperative.

With regard to the name of the corporation suing here, it may be observed, that in deeds to corporations, and the same may be said of devises, the description by name is sufficient, if there be enough to show that there is such an artificial being, and to distinguish it from all others, though the words and syllables are varied from. Bac. tit. Cor. Chancellor Kent says : " That the general rule to be collected from the cases is, that a variation from the precise name of the corporation, when the true name is necessarily to be collected from the instrument, or is shown by proper averments, will not invalidate a grant by or

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to a corporation or a contract with it, and the modern cases show an increased liberality on this subject." 2, 292.

Judge Ryland concurring, the judgment is reversed, and the cause remanded.

THE STATE, TO USE OF ROE, Plaintiff in Error, *vs.* THOMAS,
Defendant in Error.

1. In an action upon an attachment bond given under our statute, the plaintiff can only recover the natural and proximate damages resulting from the attachment. Damages for injuries to credit and business can only be recovered in an action on the case for *maliciously* suing out an attachment.

Error to St. Louis Court of Common Pleas.

On the 12th of September, 1849, Samuel Gunn sued out of the St. Louis Circuit Court an attachment against Bernard F. Roe, a resident of Iowa, for three hundred and nineteen dollars, and executed an attachment bond in the usual form, with Jacob P. Thomas as security. The writ of attachment was levied upon a lot of merchandise, worth from one to two thousand dollars, belonging to Roe, purchased by him of merchants in St. Louis, for Roe's store in Iowa, and then being on board a steamboat at the levee in St. Louis. Roe was then in Iowa. A forthcoming bond was executed by the friends of Roe, and the goods were sent forward on the same boat, without losing the trip. The attachment cause was tried on its merits, before a jury, March 5th, 1852, and a verdict found for defendant, Roe, for seventy dollars, on an offset, upon which judgment was rendered, which remains unreversed.

On the 10th of August, 1852, this suit was commenced on the attachment bond, in the St. Louis Court of Common Pleas, against Gunn and Thomas, and a trial had at the September term, 1853, of said court. There was no service on Gunn, and the suit, as to him, was dismissed.

State, to use of Roe, v. Thomas.

Upon the trial of this cause before a jury, the plaintiff gave in evidence the attachment bond and the transcript of the record of the attachment suit, and then proved that Roe had sustained direct damages and costs to the amount of three hundred and fifty-eight dollars and fourteen cents, under the following heads: For costs of taking depositions and other taxable costs in the case of Gunn against Roe; for Roe's attorney's fees, in said suit; for Roe's hotel and traveling bills, while attending to said suit; for Roe's expenses in taking witnesses to the place of taking their depositions, and for their board while attending; for Roe's direct damages for the detention of his goods and expenses incurred by him in proving their release; for the value of his time and services, while attending said suit, and interest on money expended by him in said suit. Plaintiff then offered to prove by competent witnesses that, by reason of the proceedings in said attachment suit, of Gunn *vs.* Roe, said Roe was greatly injured in his credit and standing in his business, which was that of a country retail merchant in the state of Iowa; that said Roe was in good credit and doing a good business up to the time of said attachment being sued out; that in consequence of said attachment proceedings, those who had heretofore credited him for goods refused to continue to credit him; that he was thereby wholly ruined in his credit and compelled to suspend business, and that by reason of such damage to his credit, said Roe sustained damage and loss, to an amount exceeding the penalty of the bond, \$640. Defendant's counsel objected to the introduction of this testimony, on the ground that it was irrelevant, and that the defendant could not be held liable in law on his said bond, for loss and damages sustained by Roe in consequence of loss of credit, growing out of said attachment proceedings. The court sustained the objection, and the evidence was excluded, to which plaintiff excepted. This was all the evidence in the case. The court instructed the jury that plaintiff was not entitled to recover for any loss of credit which Roe may have sustained in consequence of said attachment pro-

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ceedings. The jury gave a verdict for the plaintiff for three hundred and fifty-eight dollars and fourteen cents, and the plaintiff moved for a new trial, which was refused.

Proper exceptions were taken at the various stages of the proceedings, a bill of exceptions signed, and plaintiff prosecutes this writ of error.

Hill, Grover and Hill, for plaintiff in error. This case involves the proper construction of the fourth section of the first article of the attachment act, (R. C. 1845,) relating to the condition of attachment bonds. The condition of the bond could not well be expressed in broader terms; *to pay all damages that may accrue, by reason of the attachment or any process or proceedings, &c.* It was evidently the design of the legislature to secure full and complete indemnity for all damages that might accrue to the defendant, directly traceable to the proceedings in the attachment suit, to the extent of the penalty of the bond; and to that extent, to hold both principal and surety liable for the same character of damages that might be recovered from the principal, in an ordinary action on the case. The record shows that the attachment against Roe was maliciously sued out; but while malice aggravates the damages, its existence is not necessary to entitle the plaintiff to the full measure of damages claimed. Loss of credit arising from an attachment is the legitimate subject of damages. *Donnel v. Jones*, 13 Ala. 490. 17 Ala. 689. The last case was a suit upon an *attachment bond*. As illustrating the rule of damages, the following authorities were cited: 18 Vermont, 620. 8 Pick. 356. Peake's N. P. cases, 270. 9 Wend. 325. 17 Wend. 71. 23 Wend. 425.

F. A. Dick, for defendant in error, argued the following points: 1. Damages resulting from a loss of credit and from the non-realization of anticipated profits are too speculative and remote to be taken into consideration. Besides, so far as the profits from sales are concerned, the record in this case shows that the goods were not detained by the attachment. 2. Admitting that such damages could be recovered in an action

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on the case against the plaintiff in the attachment suit, they cannot be recovered in an action against the security in the bond. If the legislature had intended that the bond should cover such damages, they would not have limited the amount of the penalty to double the amount sued for, as that amount would, in most cases, be inadequate, if such damages were to be recovered. Upon the whole case, the following authorities are cited: Sedgwick on Damages, p. 69. 21 Wend. 144. 1 Gallison, 315, 324-5. 8 B. Monroe, 51. Ib. 160. 1 Howard (U. S.) 28. 3 Wheaton, 546, 560. The cases cited by the plaintiff from Vermont were actions *on the case*, and do not sustain the principle contended for. The other cases cited by him are met by the cases cited for the defendant.

SCOTT, Judge, delivered the opinion of the court.

This is an action against the surety in the attachment bond. The condition of the bond is, that Samuel Gunn, (the principal,) should prosecute his action without delay, and with effect, refund all sums of money that might be adjudged to be refunded to the defendant, or found to have been received by the plaintiff and not justly due to him, and pay all damages that might accrue to any defendant or garnishee, by reason of the attachment or any process or proceeding in the suit, or by reason of any judgment or process thereon.

The only question presented by the record is, whether the plaintiff can show that his character and reputation, as a merchant, were injured by reason of the attachment, and that he was compelled to suspend his business in consequence of it.

1. Nothing can be clearer, both on principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. 10 Mo. Rep. 566. If the design of the legislature, in prescribing the condition of the bond for an attachment, was to cover such damages as are claimed by the plaintiff, there would have been no necessity for the various specifications which are found in

State, to use of *Roe, v. Thomas.*

the condition. If all possible damages, proximate and remote, were designed to be covered by the clause giving damages that might accrue by reason of the attachment, why afterwards insert a clause allowing damages sustained by reason of any judgment or process thereon? This distribution, or rather specification of the results of an attachment, and the giving damages accruing by reason thereof, shows what damages were in the contemplation of the general assembly, when they allowed for all that might accrue to any defendant, by reason of the attachment. It is worthy of observation, that the defendant and garnishee are mentioned together, as equally likely to suffer from the effects of the writ. If it was the intent to give the defendant damages for the loss, he would not thus have been connected with the garnishee who could sustain no such damage. The law says the clerk shall judge of the sufficiency of the penalty. If injuries to the credit were designed to be covered by the penalty, how could the clerk estimate the sum necessary to compensate them? By what means would he be enabled to ascertain the amount that would cover such damages? In this very case, it is said that the damages are greater than the penalty of the bond, and so they would be in every case. The clerk does not know that any such damages will accrue, and cannot inform himself thereof. Even if he was assured that damages would accrue, he could not possibly ascertain their extent. In requiring the clerk to judge of the sufficiency of the bond, the law must have designed that he should require a penalty that would cover the natural and proximate consequences arising from attaching property equal in value to the debt sued for, which would be known to the clerk. He would have no other data in fixing the penalty.

The question here is, not whether the plaintiff is entitled to damages for a malicious attachment against his goods, whereby his credit was injured and his business suspended, but whether the terms of the bond were designed to cover such damages. For a wrongful attachment, a plaintiff may bring his action on the case, and recover damages for the injury

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sought to be compensated in this action. For a malicious arrest, for a malicious suing out execution, or any other malicious abuse of process, the injured party has his remedy in a special action on the case. The same resort is open to the plaintiff in this suit. The case of *Donnel v. Jones*, 17 Ala. 689, in which the court held that, in an action for a wrongful attachment, injuries done to the credit of the plaintiff by reason thereof, might be compensated in damages, was not on an attachment bond, as was supposed, but was an action on the case.

The statute was not designed to give damages beyond the natural and proximate damages resulting from the suing out of an attachment. For injuries to his credit and business, the plaintiff is only entitled to damages, where the motives of the defendant have been vicious; where his proceedings have been malicious and vexatious. To allow damages for loss of credit to business, in an action on the bond, would be to make the plaintiff responsible in one form of action, when, if it had been brought in another form, he might have interposed a defense which would have protected him. In a suit on the bond, the defense of a probable cause would be unavailing. However upright and innocent his motives, he would be mulcted in the same manner and to the same extent, as though his conduct had been swayed by the blackest malice. *Offut v. Edwards*, 9 Rob. Lou. 92.

In the case of *Pettit & Owen v. Mercer*, 8 B. Mon., the action was on a bond for an attachment, the condition of which was, to pay all damages and costs that might be sustained by the defendant in the suit, by reason of the order for the attachment. There, the court held that the plaintiff was confined in his recovery to the costs and expenses incurred by him, and such damages as he may have sustained by a deprivation of the use of his property or any injury thereto, or loss or destruction thereof, consequent upon the suing out of the attachment; that he had no right to recover for injuries to his credit, or for the derangement of his business; that, for such injuries, he had his redress in an action on the case for the wrongful process.

Ashby v. Dillon.

The court which tried this cause, seems to have adopted the foregoing rule as the measure of the damages to be recovered in an action on an attachment bond. We see no reason to depart from it.

The other judges concurring, the judgment will be affirmed.

ASHBY, Respondent, vs. DILLON & LESTER, Appellants.

1. A note given to a constable for forbearance to levy an execution is void.

Appeal from St. Louis Law Commissioner's Court.

M. L. Gray, for appellant. The note taken by the constable under color of his office, was given for an illegal consideration and is void. The duty of the constable was to levy the writ. The act of the constable was a criminal offence by statute, (R. C. 1845, p. 390-1, §16, 17, 19, p. 506, §38.) Transactions prohibited under a penalty are void. Chitty on Contracts, 695 and cases there cited. Again, the note is void by the general policy of the law. 2 Burr. 924. 6 Comyn's Dig. 2 W. 25, p. 384-5. 5 Mass. 385, 541. 4 ib. 370. 8 J. R. 98. 7 J. R. 159, 319, 426. 12 J. R. 207. 3 Thomas' Coke, 541. 17 Mo. Rep. 555.

P. E. Bland, for respondent. The note was given for a sufficient and a legal consideration. It was perfectly competent for the officer, if he saw fit, to assume the liability which he incurred by a failure to levy the execution, and the note given by the execution debtor to indemnify him is valid. That the note is for double the amount of the execution debt does not affect its validity. The consideration was the risk incurred by the officer in forbearing to levy.

SCOTT, Judge, delivered the opinion of the court.

This was an action on a promissory note for eighty-one dollars and sixteen cents, by the respondent, Ashby, as assignee,

Ashby v. Dillon.

against the appellants. The note was payable to John Bray, who was constable of Central township, in St. Louis county.

Ths facts are, that Bray, the constable, had an execution against the defendant, Dillon, and went to his house, on the day Dillon intended to have sale of some of his property, for the purpose of levying it. Dillon had a race horse which some of the witnesses say was worth a thousand dollars. Dillon directed the constable to levy on this horse, and informed him that he would give a delivery bond for the forthcoming of the property on the day of sale. This the constable refused to do, and threatened to levy on the property about to be sold on that day, unless Dillon would give him a note, with security, for double the amount of the execution; that his purpose in having a sale might not be frustrated, Dillon executed the note sued on, with Lester as his security. The note was not returned with the execution, but was assigned as the private property of the constable to the plaintiff, who was the subscribing witness to it, and was fully apprised of all the circumstances under which it was given. It did not appear that the execution in the hands of the constable had ever been satisfied. It appeared that the note was given for double the amount of the execution.

1. A more outrageous abuse of authority in a public officer is rarely presented, than is disclosed by the facts of the case before us. The constable should not have refused to levy on the horse. The evidence shows that he was amply sufficient to satisfy the execution. A constable, by virtue of an execution, has no right to elect on what property of the debtor he will serve his writ, that he may extort money for afterwards releasing it. The consideration of the note sued on was the forbearance of an officer to do that with his writ which he had no right to do. It was a gross perversion of the duties of his office, and it is surprising that he should have had the hardihood to bring such a case to the knowledge of the courts.

The other judges concurring, the judgment will be reversed, and judgment for the appellants.

Mount v. Valle.

MOUNT, Plaintiff in Error, *vs.* VALLE *et al.* Defendants in Error.

1. Under the act of 1825, a widow's dower was barred by an administration sale to pay her husband's debts.
2. The failure to file the accounts and lists with a petition for an administration sale, will not render the sale void, especially where the petition itself contains a statement of the condition of the estate.

Error to St. Louis Circuit Court.

This was a petition filed by Eleanor Mount, in February, 1852, to recover dower in certain real estate in the city of St. Louis, of which her husband, Britton Mount, died seized in February, 1832. The defendants claimed title under an administration sale, after the death of Mount, to pay debts due from the estate.

On the 9th of August, 1833, Daniel Busby, administrator of Britton Mount, filed a petition praying for an order of sale of the real estate in controversy to pay debts. The petition stated that the proceeds arising from the sale of the personal property of the deceased amounted to \$432 64; that the debts already allowed against the estate amounted to \$1311 87½, leaving a balance of \$968 11, for the payment of which there were no assets in his hands; and that other debts were due from the estate which had not yet been presented for allowance, which would nearly, if not quite, balance the debts inventoried as due to the estate. No separate accounts or lists were filed with the petition. On the same day, the court made an order of publication. On the 5th of November, 1833, upon proof of the publication of the order, according to law, the court made an order of sale. The sale was made and confirmed. The defendants showed title under the sale. The administrator accounted for the proceeds, and upon final settlement the plaintiff received a distributive share of the estate. The court below declared that the sale was a bar to the widow's dower,

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and gave judgment accordingly. The plaintiff brings the case here by writ of error.

S. A. Holmes, for plaintiff in error. 1. No title passed by the administration sale, because the petition filed by the administrator was not accompanied by the proper accounts, lists and inventories. This point did not arise in the case of *Overton v. Johnson*, 17 Mo. Rep. 2. The widow's dower was not affected by the administration sale. Although her dower may be subjected to the payment of debts, it cannot be reached in this way. R. C. 1825, vol. 1, tit. "Administration," §46. *Ib.* §67. The title to dower becomes consummated upon the death of her husband, and when assigned, the widow is in under the husband and not the heir. That her right was not to be held in abeyance until final settlement may be seen by reference to the Revised Code, 1825, tit. "Dower," §9. 1 *Hilliard Abr.* 68, 72 and cases there cited. *Ib.* 76. 4 *Mass.* 388. 3. The fact that the widow received her distributive share of the estate does not affect her rights here. *Wyatt v. Brown*, 8 S. & M. 365.

R. M. Field, for defendants in error.

GAMBLE, Judge, delivered the opinion of the court.

The plaintiff, whose husband died in 1832, claims dower in property of her husband, which was sold by his administrator, under an order of the county court of St. Louis county, in 1832, to pay the debts of the intestate.

The defendants rely upon the sale, and upon the fact that the widow settled with the administrator, and received her portion of the surplus arising from the sale of the real estate, after paying the debts.

1. A widow was not entitled to dower under the code of 1825, which was in force at the time of the death of the plaintiff's husband, "until all just debts due or to be due by her deceased husband, shall have been paid." R. C. 1825, 333, sec. 1. The same proviso in which this language is used,

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makes a sale of real estate of the husband, under execution in his life-time, a bar to her dower in the estate so sold. In whatever mode, under the law, the property is disposed of for the payment of the husband's debts, the widow could have no right to dower therein. If it was sold after his death by a proper proceeding, in order to pay his debts, her dower is as effectually barred, as if it had been sold on execution in his life time.

2. We next come to consider the objections made to the sale by the administrator, and the only one urged in argument is, that the petition to the county court was not accompanied by the lists and accounts which the law required to be filed with the petition. Remarks were made upon this objection to such sales, in *Overton v. Johnson*, 17 Mo. 449, and the opinion is there very distinctly expressed, that the filing of the accounts and lists is not necessary to the jurisdiction of the county court. The jurisdiction is acquired by filing the petition praying the court to make an order, which, under the statute, the court is competent to make. Provision is made for notifying all parties interested to come in and resist the application, and the act contemplates a hearing of parties, and an adjudication upon the subject of the petition, although there are not to be any formal pleadings. The notice to be given is not to be given by personal service, but by publication, and at this term, a sale has been declared illegal, where it appeared by the record to be impossible that the notice could have been published before the order for the sale was made. *Vallé v. Fleming*. This notice is a more important fact, in order to the exercise of the power of the court, than the filing accounts and lists with the petition, and yet the Supreme Court of the United States, in *Grignon v. Astor*, 2 Howard, 335, held that such notice would be presumed from the subsequent action of the court in ordering the sale.

In the present case, the objection is spun out to the utmost degree of attenuation. The petition filed by the administrator states, upon its own face, that the administrator had sold the

personal property inventoried as belonging to the estate, and that the proceeds amounted to \$432 64; that the amount of debts due and allowed by the court against the estate, was \$1311 87½, leaving a balance against the estate of \$968 11½, for the payment of which sum there were no assets in his hands belonging to the estate; that there were, to the knowledge of the administrator, debts due by the estate, but not yet allowed by the court, which would nearly, if not quite balance the debts inventoried as due to the estate. Upon the filing of this petition, the court makes the order of publication, reciting that the administrator had filed his petition praying for an order for the sale of the real estate, containing the accounts, lists and inventories required by law in such case." At the next term, the publication required by law is proved, and the order of the court recites "that the court proceed to hear the testimony produced, and to examine the parties who appear, touching the application of the administrator for the sale of the real estate, and it being satisfactorily proved to the court that there are not sufficient personal estate and effects of the deceased, charged with the payment of debts, nor sufficient assets in the hands of the administrator to pay the debts due by the estate, thereupon it is considered, ordered and decreed," &c. The time and terms of sale, and the notice to be given are fixed, and at the next term, the administrator makes his report, showing his compliance with the order, in making the sale, and the sale is confirmed by the court. It certainly would sound strangely if a court should decide that it was necessary that the lists and accounts should be upon a different paper from the petition, and that the fact that the administrator incorporated the particulars of such accounts and lists in his petition, was an objection to the jurisdiction of the court, and affected the validity of the sale. In this petition, the administrator does not state the amount of debts due to his intestate, but he states that the amount, as shown by the inventory, will be equalled by debts due from the estate, not yet allowed. Taking the statements of the petition to be true, there was an evident necessity

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for selling the real estate. The court acted upon the petition, regarding it as sufficiently showing the condition of the estate and the propriety of ordering the sale. It acted within the limits of its jurisdiction, and there is no objection to the sale that can affect the title acquired under it.

The judgment of the court is affirmed, with the concurrence of the other judges.

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PRATTE & DICKSON, Defendants in Error, *vs.* SCOTT & OTIS,
Plaintiffs in Error.

1. A factor having in his possession goods consigned to him for sale, is not liable to be garnished on execution as a debtor of the owner.

Error to St. Louis Circuit Court.

An agreed statement of the facts is set out in the opinion of the court.

T. T. Gantt, for plaintiffs in error. Only *debtors* can be summoned as garnishees under a *fi. fa.* R. C. 1845, p. 476, §6. 7 Mo. Rep. 435. 13 Mo. Rep. 451. The consignee of goods before sale cannot be treated as a debtor.

Comfort & Manter, for defendants in error.

RYLAND, Judge, delivered the opinion of the court.

In this case, the following statement of facts is agreed upon by the counsel of the parties :

“ Pratte & Dickson having a judgment against Gridley, issued an execution, and summoned Scott & Otis as garnishees of Gridley. The garnishees answered and showed that, at the time they were so summoned, they had a consignment in their hands belonging to Gridley, on which they had made large advances ; that the consignment was unsold when they were summoned ;

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that, in the interval between their being so summoned and the sale by them (they were auctioneers) of the consignment, they were summoned as garnishees in a suit of original attachment, wherein Laureal & Taylor were plaintiffs, and Gridley was defendant, and that the proceedings in that cause were still pending and undetermined in the St. Louis Court of Common Pleas; that, after being so summoned in both cases, they sold the consignment, and a small balance remained in their hands to the credit of Gridley; and that they were not otherwise indebted, &c. Whereupon, the said garnishees prayed to be discharged. But the court gave judgment against them on their answer, in favor of Pratte & Dickson, for the balance which remained in their hands, and the garnishees excepted. It is admitted that judgment has since been rendered against the said garnishees, in the St. Louis Court of Common Pleas, for the same balance, as garnishees of Gridley, in favor of Laureal & Taylor, who commenced their suit, as aforesaid, by original attachment, summoned Scott & Otis, as garnishees, before the consignment was sold, and duly prosecuted the suit to judgment against Gridley, and against Scott & Otis, as his garnishees."

1. From this statement, it is plainly to be seen that the only question of importance, for our consideration, is in regard to the indebtedness of the garnishees, Scott & Otis, to the defendant in the execution, Gridley. If Scott & Otis are *debtors* to Gridley, then the judgment below was proper; if not debtors, then the judgment is erroneous.

The statute permitting debtors of the defendant in an execution to be summoned as garnishees, has been more than once before this court for construction and interpretation.

In the cases of *Van Winkle & Randall v. McKee*, defendant, and *Baum*, garnishee, 7 Mo. Rep. 435; *Lee et al.*, v. *Faber & Watson*, 8 Mo. Rep. 322, and *Wood v. Edgar*, 13 Mo. Rep. 451, it can be seen that this court regards the statute permitting the garnishing on execution as much more limited and restricted than the garnishing in original suits by

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attachment. The persons liable to this process on execution, must be *debtors* to the defendant in such execution. The relation of debtor and creditor must exist between them.

In the case of *Wood v. Edgar*, 13 Mo. Rep. 451, it was held, that a special deposit of coin did not make the depositary a debtor, within the meaning of this statute, allowing garnishees to be summoned on execution. The court said: "We do not understand that, under this act, a person having possession of property of the defendant in the execution, can be garnished." Such person must be a debtor of the defendant before he is liable to this process.

Now it appears that the garnishees in this case were auctioneers, and as such had received, on consignment, property belonging to Gridley, the defendant in the execution, on which they had made advancements; that the consignment was unsold when they were summoned; that, before the sale of the consignment, and after they had been garnished on the execution, they were summoned as garnishees in a suit of original attachment, wherein Laureal & Taylor were plaintiffs, and the said Gridley, defendant, and this suit was still pending in the St. Louis Court of Common Pleas. Under the principles laid down in the cases heretofore before this court, these defendants were not debtors to Gridley when they were garnished; the relation of debtor and creditor was not existing between them, and they were not liable to be summoned as garnishees on execution. In attachment suits, garnishees need not be debtors; they may be garnished if they have property of the defendant in their possession. The relation of creditor and debtor need not necessarily exist between them. Not so, when garnished on execution. We, therefore, adhering to the former decisions upon this subject, which we think are the true and correct interpretation and construction of these statutes, do reverse the judgment below, the other judges concurring.

Loehner v. Home Mutual Ins. Co.

LOEHNER & WIFE, Respondents, *vs.* THE HOME MUTUAL INSURANCE COMPANY, Appellant. •

1. Same case, 17 Mo. Rep. 247, affirmed.
2. It is irregular practice for a court to comment upon evidence by way of instruction to a jury.

Appeal from St. Louis Court of Common Pleas.

The facts of this case sufficiently appear in the opinion of the court, when it was formerly here (17 Mo. Rep. 247) and in the opinion which follows.

Hill, Grover & Hill, for appellant, (among other points, which were settled when the cause was formerly here,) insisted that the court below erred in giving the third instruction, which was an extract from the former opinion of this court, and was a mere comment upon the facts, calculated to mislead the jury. Upon the whole case, they cited the following authorities: 3 Dall. 491. 1 Wash. C. C. R. 283. *Howell v. Cincinnati Insurance Co.*, 7 Ham. (part 1,) 276. 2 Denio, 75.

H. N. Hart, for respondent.

SCOTT, Judge, delivered the opinion of the court.

This case is reported in the 17th vol. Mo. Rep. 247. After the cause was remanded, upon a trial of so much of it as related to the insurance on the piano and furniture covered by the policy, there was evidence that the secretary, who countersigned the policy, was frequently at the house before it was insured, and often drank wine there, and advised the plaintiff, Jeannettine, to have her house insured. The secretary, by the by-laws of the company, filled up and recorded all policies, and was ex-officio a director. The record shows that the notice of an assessment, required by the by-laws to be given to the insured, to the end that the benefit of the policy may be forfeited in the event of the non-payment of the assessment, had never been given.

The court gave the following instructions :

1. If the jury believe from the evidence, that the house in question was used as a bawd house, or as a tippling house, or dram-shop, and that such use of the house was concealed from the defendant, and that any one of such facts, so concealed, was material to the risk, then the plaintiff cannot recover.

2. In inquiring into the materiality of the facts alleged to be suppressed, it is important for the jury to consider that, by the by-laws of the defendant, all buildings to be insured were classed, and the premiums on them proportioned to the risk incurred, and that the trades and kinds of merchandise were enumerated for which an increased premium was demanded, and that none of the facts alleged to be material and suppressed in this case, were mentioned in the by-laws, as affecting the risk.

3. The jury will also take into consideration only the natural consequences of the use to which the house was applied, and whether an enhancement of the risk or of loss by fire was a natural consequence of such use.

4. The jury are further instructed, that there is no evidence tending to show a refusal or failure of the plaintiff, Jeannettine, to pay any assessment which, by the requirements of the policy, she was bound to pay, and therefore that defence, set up in this case, the jury will disregard.

5. The jury are instructed, that the defendant has not shown that there was any insurrection of the citizens at the time of the loss of property mentioned in the policy, and, therefore, that is no defence, in this cause, for the consideration of the jury.

The court refused the following instructions :

1. If the jury believe from the evidence, that, at the time of the application for insurance in this case, the said Jeannettine Clementine described the building insured and containing the property insured as a *dwelling house*, and it was so described in the written application for insurance, and that, in fact, the said Jeannettine, at the time of the loss of said property insured, kept in said premises a bawdy house, or house of ill-fame,

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commonly called and known as a whore house, and that the risk of fire upon a bawdy house or whore house is greater than the risk of fire upon a dwelling house, then the jury will find for the defendant.

2. If the jury believe from the evidence, that the said Jean-nettine Clementine, at and before the time of said application being made out by the agent of said company, misdescribed the purpose for which said building was occupied, and that she suppressed the purposes for which said premises were occupied, and that the said insurance was obtained upon such misdescription and suppression of the facts, as aforesaid, and that the president, who affixed the rate of premium upon said policy, was ignorant of said facts, and the real occupancy of said house was unknown to him; and that the said house, at the time of the application and the issuing of the policy, was occupied as a bawd house, and that the risk by fire was thereby increased, then the jury will find for the defendant.

3. The knowledge of the character of the house of Madame Clementine, by C. C. Cady, or Ledyard, if not imparted to Isaac L. Garrison, the president, or to the board of directors of the company, or to either of the directors of said company, or to the agent, who took the application, at or before the time of the issuing of said application, can have no effect upon the question of the concealment or suppression of the facts as to the occupation of the said premises.

4. If the jury find from the evidence, that neither Alonzo Cutter or Isaac L. Garrison knew or were informed of the character of the house of Clementine, at the time of the approval of the application and the issuing of the policy, then the secret knowledge of the fact of that house being a bawd house by Cady or Ledyard, is of no avail to the plaintiffs upon the issue, as to the concealment of the facts of the occupancy of said premises.

5. The statement of the purpose for which the house of Clementine was occupied in the application, is a warranty to the extent that no other more hazardous occupancy of the prem-

ises will be suffered by the insured ; and if the jury believe from the evidence, that the house in question was occupied as a house of ill-fame instead of a dwelling, at the time of insurance and afterwards, and that wines were sold there, and that thereby the risk by fire was increased, then the jury will find for the defendant.

1. The instructions given by the court asserted the law as it had been declared when this cause was formerly here ; and those asked by the defendant were properly refused, as they were counter to those given.

2. The reading the extract from the opinion of this court in the cause, by way of instruction, as it related to a matter of fact, was not strictly regular, as it was not accompanied with suitable explanations of the province of the jury, under such circumstances. A court should not comment upon the evidence in the authoritative way of an instruction. If it sees fit to make comments on the evidence, it should always be so done that the jury may know that the views of the court cannot legally control them ; but, notwithstanding such comments, they are at liberty to find in such way as to them seems right and proper from the evidence, although such finding may be in opposition to the opinion entertained by the court. If a cause is brought to this court and should be sent back for a new trial, it would not be proper to give the comments this court may make on the evidence to the jury, by way of instruction. If the court below sees proper to adopt the language of this court, in commenting on the evidence, it should always be with the explanation that such comment is offered to their consideration, and that they should attach only that degree of importance to it which, in their opinion, it deserves. Comments on the evidence, by the court, are not binding on the jury. The jury may rightfully entertain a different opinion in relation to the facts of a cause, from that possessed by the court. The court declares the law. The jurors find the facts, and in their finding cannot be authoritatively controlled by the

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court, though they will treat its suggestions with that deference and respect which our system of jury trial exacts at their hands.

As this case did not turn on the fact about which the extract was read, we do not see proper to reverse the judgment for this cause.

The other judges concurring, the judgment will be affirmed.

HAVEN, Respondent, vs. FOLEY & PAPIN, Appellants.

1. The payee of a note will be entitled to the benefit of any counter security given for the indemnity of an indorser, and a party to whom the debt evidenced by the note is transferred, will also be entitled to the benefit of the counter security. (*Haven v. Foley & Papin*, 18 Mo. Rep. 136, affirmed.)
2. Where the payee of a note, indorsed by one who holds a deed of trust for his indemnity, agrees to accept the note of a third party, and substitute him as the creditor of the maker of the original note, to which agreement the indorser is a party, the substituted creditor will be entitled to the benefit of the deed of trust, although it was a part of the agreement that the original note should be delivered to the indorser.
3. The substituted creditor, when sued for the property by a subsequent incumbrancer, will be protected in equity, although the note was not assigned to him, if the debt evidenced by the note was transferred to him.

Appeal from St. Louis Court of Common Pleas.

This was an action for the recovery of personal property or its value. The defence set up in the answer is stated in the opinion of the court, delivered when the cause was formerly here. 18 Mo. Rep. 136. The case now comes here after a trial upon the issue made by the answer. The defendants read in evidence the deed of trust given by James Shepard to secure E. H. Shepard, as his indorser, upon the two notes made by him to Emerson, and also the assignment of the said deed of trust and of the property therein described, by E. H. Shepard and the trustee to the defendants. They then proved by Emer-

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son that it was agreed between himself and E. H. Shepard and the defendants, that the latter should execute to him their own note, with indorsers, for the amount of the notes of James Shepard, in exchange for those notes, and that E. H. Shepard should assign to the defendants the deed of trust; that the defendants did execute to him their notes for the amount, indorsed by C. D. Sullivan & Co.; that he (Emerson) thereupon delivered up the notes of James Shepard to E. H. Shepard, who was to indorse the same without recourse to the defendants. Emerson stated that it was no part of the agreement that he himself should indorse the notes. E. H. Shepard stated the agreement to be that the defendants should execute their own notes, indorsed by C. D. Sullivan & Co., to Emerson, *in payment* of the notes of James Shepard, indorsed by him and held by Emerson, in consideration of which he was to assign to the defendants the deed of trust, which was executed by James Shepard to him for his indemnity as indorser, and deliver to them the property covered by said deed of trust, which he did. He stated that he never agreed to assign nor deliver the notes of James Shepard to the defendants, but that the understanding was that he (E. H. S.) should keep the notes; that he had since offered to deliver the notes to the defendants after taking off his name, if they would pay certain expenses, which they refused to do. The court below gave the following among other instructions:

2. If the jury find from the evidence, that it was agreed between Emerson, E. H. Shepard and Foley & Papin that F. & P. should execute and deliver to said Emerson their notes, for the same amount as those made by James Shepard, in lieu thereof, and payable at the same times, and indorsed by C. D. Sullivan & Co., and that, in consideration thereof, the deed of trust from said James to E. H. Shepard's trustee, given in evidence by the defendants, should be assigned and delivered to said Foley & Papin, and the said notes of the said James should be delivered to said E. H. S., and if they also find that, by said agreement, the defendants were to take the place of

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said Emerson, as the creditors of said James Shepard, and that the notes of the defendants, indorsed by C. D. Sullivan & Co., as above described, were executed and delivered in pursuance of said agreement to said Emerson, who, thereupon, delivered the said notes of said James to said Elihu H., and that said deed of trust was assigned and delivered to said Foley & Papin, together with the property therein described, and that said property is the same sued for in this action, then the plaintiff cannot recover."

The plaintiff asked the court to direct the jury that the defence was not made out, if Emerson did not agree to indorse or assign the old notes to Foley & Papin, and did not indorse or assign them, which the court refused to do.

After a verdict and judgment for the defendants, the plaintiff again appealed to this court.

M. L. Gray and *N. & S. A. Holmes*, for appellant. 1. The court erred in refusing to direct the jury as asked by the plaintiff. 2. The instruction given is erroneous in leaving out of view the fact whether there was an agreement by Emerson to assign the debt to the defendants. Under that instruction, the jury might find for the defendants, consistently with the idea of a voluntary *payment* by defendants of James Shepard's debt. 3. It having been agreed that E. H. Shepard, as the surety on James Shepard's notes, should be discharged, the deed of trust was extinguished, and it makes no difference that there may have been an agreement to deliver the notes to the defendants. 30 Maine, 35. 31 ib. 501. 19 Pick. 434.

T. B. Hudson, for respondents.

GAMBLE, Judge, delivered the opinion of the court.

1. When this cause was formerly in this court, it was held that Emerson, as the holder of the notes of James Shepard, indorsed by Elihu H. Shepard, was entitled to the benefit of any counter security given by James Shepard to Elihu H. Shepard, his security upon the notes. It was further held

that, if by the agreement between Emerson, Elihu H. Shepard and Foley & Papin, and the acts of the parties under such agreement, F. & P. became the creditors of James Shepard, substituted for Emerson, then F. & P. became entitled to the counter security, which had been given to Elihu H. Shepard.

2. The instruction given upon the trial of the case, presents difficulties which might readily have been avoided. The answer of the defendants alleges that the agreement between Emerson, Elihu H. Shepard and the defendants was, that the defendants should execute their note to Emerson in lieu of those made by James Shepard, and that James Shepard's notes should be delivered *to them* and the deed of trust and property held by Elihu for his security should be assigned and transferred to the defendants. The instruction puts it to the jury to find that the agreement was, that the notes of James Shepard were to be delivered to Elihu H. Shepard, and that by the agreement, the defendants were to take the place of the said Emerson as the creditors of James Shepard. There was no necessity for departing, in the instruction, from the terms of the agreement, as set up in the answer. The defendants state the agreement and allege its execution as a bar to the plaintiff's action, and the court, with great propriety, might have put the case to the jury as the defendants themselves had stated it. Still, we are to consider whether the instruction placed before the minds of the jury the real question of defence. The defence is, that, by the agreement, the notes of the defendants, delivered to Emerson, were substituted for those of James Shepard, and were not in satisfaction of them, and that the defendants were to become the creditors of James Shepard. The notes of Shepard were still to be outstanding and unsatisfied, for in no other way could the defendants be the creditors of James Shepard. If they had made a mere voluntary payment of the notes to Emerson, without the knowledge or request of James Shepard, while yet his notes were not due, they would not have been the creditors of J. Shepard. The instruction, then, must mean, that the notes of J. Shepard were

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to continue to be in force and available for the defendants, when it puts the question to the jury whether, by the agreement, the defendants were to take the place of Emerson as the creditors of James Shepard. Such being the question upon which the jury were required to pass, it became of little importance whether the notes were to be delivered to Elihu H. Shepard or to the defendants.

3. The plaintiff insists that his action is not affected by the arrangement between these parties, because Emerson did not assign the notes of James Shepard to the defendants, and therefore they cannot claim any of the rights which may have belonged to him as the payee of the notes. But it is to be remembered, that we are not determining the case according to the common law. We have already recognized and applied in this case the principles which belong entirely to equity jurisprudence. Such is the meaning of the code of practice. No assignment by an indorsement of the notes of J. Shepard was necessary to substitute the defendants for Emerson, as the creditors. The delivery of the notes with that intent, for a valuable consideration, is all that is required in equity. 2 Story's Equity, 311, §1047. *Heath v. Hale*, 4 Taunt. 327. Although such transfer may not be sufficient to authorize the holder of a bond or note to maintain an action in his own name, it will create an equity which will be recognized and protected. The question of fact, then, was tried by the jury, whether, under the agreement, the defendants had been substituted for Emerson as the creditors of James Shepard, and was found for the defendants, and, under the principles declared in the former opinion in this case, the judgment was correctly given for the defendants. The judgment is affirmed.

APPLETON *et al.*, Appellants, *vs.* KENNON, Respondent.

1. The acceptance by a creditor of the note of a third party for a debt is not *prima facie* an absolute payment. To have that effect, it must be agreed that it should be taken in satisfaction.

Appeal from St. Louis Law Commissioner's Court.

Action on a note commenced before a justice. The defence relied upon was, that the plaintiffs had accepted the notes of W. D. Skillman in payment of the note sued upon. The facts and the instructions are set out in the opinion of Judge Ryland. After a judgment for the defendant, the plaintiffs appealed.

D. W. Hill, for appellants. The instruction given by the court left out of view the real question in the case, which was, whether Skillman's note was accepted by the plaintiffs in full satisfaction and payment of the note sued upon.

H. Hitchcock, for respondent. The instructions, taken together, fairly present the issue to the jury. The second instruction given for the plaintiffs informed the jury that the plaintiffs could recover if they accepted the notes of Skillman merely as collateral security. They must have received the notes either as collateral security, or in payment. Where an error in an instruction is cured by another instruction given, this court will not reverse. 13 Mo. Rep. 286. *Ib.* 308. 15 Mo. Rep. 278. *Ib.* 315.

RYLAND, Judge, delivered the opinion of the court.

The main question in the case involves the propriety of the instructions given by the court to the jury.

There was no dispute about the note, nor the partnership of the plaintiffs. The defendant took upon himself to avoid the note by showing that it had been paid or settled. To do this, he introduced W. D. Skillman, who testified that, by an agreement with the defendant, of which the plaintiffs were informed, he

assumed defendant's liabilities to plaintiffs and others, including the note sued on here.

Plaintiffs agreed to receive defendant's draft on Skillman, accepted by Skillman, for said liabilities; but this arrangement was not carried out. Soon after this arrangement, Skillman saw plaintiffs in New York and made a settlement with them of his own liabilities to them. In this settlement were included the liabilities of the defendant, consisting of this note and an open account. Plaintiffs gave Skillman a "statement" in writing of the balance struck on settlement made between them; among the items debited to Skillman, in said statement, are two notes of his own, then due and unpaid, and the note here sued on and the open account, amounting in all, with the other items, to the sum of \$1400 11. Skillman is credited in this statement with his own three new notes, together with some articles of merchandise returned; these new notes, payable at sixty and ninety days, and at four months, each for the sum of \$444 58, making in all, with the returned articles, \$1400 17. It was Skillman's own proposal to plaintiffs to renew his own unpaid notes, settle his own open account with them, settle defendant's note with them for \$106 57, and also defendant's open account with them for \$101 27, by giving plaintiffs his own three notes for \$444 58 each, as above stated, which proposition plaintiffs accepted. This agreement was carried out, and the above statement was handed to Skillman by the plaintiffs. Skillman asked plaintiffs (or one of the appellants) for defendant, Kennon's note, but he declined to give it up, saying he did not know whether it was worth any thing or not, but he believed he would hold on to it. Nothing was said about the terms on which he would keep the note or any liability of Kennon's thereafter. Skillman afterwards paid two of these three notes; the other is yet unpaid, he having failed in business. The plaintiffs introduced evidence tending to show that, at the time of the settlement mentioned by Skillman, plaintiffs refused to give up Kennon's note until Skillman's notes, then given, should be paid; that plaintiffs then declared they should still hold Kennon

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responsible, and they did not take Skillman's note except as collateral security for defendant's liability; that defendant's note was given for books purchased by him of plaintiffs, and the same had never been paid by any one. Skillman recalled, stated that the account given by plaintiff's witness, as above, was not the true one; nor was the conversation mentioned between them correctly stated.

Upon this state of the evidence, the court instructed the jury as follows:

1. The jury are instructed that the note sued on is *prima facie* evidence itself of the demand.

2. If the jury find from the evidence, that the plaintiffs only received the notes of W. D. Skillman as collateral security for the notes of the defendant, they will find for the plaintiffs.

3. The jury are instructed that the plaintiffs' right to recover in this case cannot be impaired by any private arrangement or agreement between the defendant and Mr. W. D. Skillman, to which the plaintiffs were not parties.

The court gave the following of its own motion:

"If the jury shall believe from the evidence, that the witness, Skillman, assumed the payment of the amount of the defendants' indebtedness to the plaintiffs, with the consent of the plaintiffs, and in pursuance of such assumption, did execute and deliver to the plaintiffs his promissory notes, which notes included the amount of the note sued on in this case, they will find for the defendant."

1. The instructions given for the plaintiffs are proper enough, but we cannot say so of the one the court, of its own motion, gave for the defendant. That instruction is improper, nor will the second instruction do away with the error; it was calculated to mislead to jury, and it set forth a proposition not maintainable in law.

"Promissory notes, either of the maker himself or of a third person, are often received by the holder or the creditor, in payment of the original note or debt due by the maker, and the question often arises when and under what circumstances the

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receipt of the substituted note will be deemed a due and absolute extinguishment or satisfaction of the original debt or note, or not. In general, by our law, the receipt of a promissory note of the maker, or of a third person, will be deemed a conditional satisfaction or extinguishment only of the original debt or note of the maker, (that is, if the substituted note, so received, is regularly paid,) unless otherwise agreed between the parties. It is at most, therefore, only *prima facie* evidence of satisfaction, rendering it necessary that the party receiving the substituted note, should account for it, before he will be entitled to recover upon the original debt or note. But if it is agreed between the parties, as it well may be, that the substituted note shall be an absolute payment of the original debt or note, then it will operate as an absolute satisfaction or extinguishment thereof." Story on Prom. Notes, §404. In general, the receipt of a promissory note of the debtor for a debt is, in the absence of all other proof, treated as a conditional payment only of the debt; that is to say, if, or when the note is paid. But if the note is intentionally received as an absolute payment, the original debt becomes thereby extinguished. The receipt of the promissory note of a third person, in payment of the debt, will amount to a positive extinguishment of the original debt, by way of novation, as well by our laws as the foreign law, if so intended by the parties. Story on Prom. Notes, §488. In general, by our law, unless otherwise especially agreed, the taking of a promissory note for a pre-existing debt, or a contemporaneous consideration, is treated *prima facie* as a conditional payment only, that is, as payment only if it is duly paid at maturity.

In *Johnson v. Weed et al.*, 9 Johns. Rep. 310, the court, in its opinion, said: "The books all agree that there must be a clear and special agreement that the vendor shall take the paper absolutely as payment, or it will be no payment, if it afterwards turns out to be of no value." In the case of *New York State Bank v. Fletcher*, 5 Wend. 87, the court, in giving its decision, mentioned the case of *Tobey v. Barber*, 5 Johns.

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68, which was a case where a note was taken for rent due on a lease, and an absolute receipt of the payment of rent indorsed thereon. The plaintiff was permitted to recover on covenant for the rent, the note not being payment. The court, in the case of *Tobey v. Barber*, said: "That a note, either of the debtor or of a third person, for a pre-existing debt, is no payment, unless the creditor expressly agree to take it as payment, and to run the risk of its being paid; or, unless he parts with the note, or is guilty of *laches* in not presenting it for payment in due time." In the case of the *Bank v. Fletcher*, Marcy, J., said: "The rule quoted from *Tobey v. Barber*, is laid down with great caution. It is there stated that the note must be expressly agreed to be taken as payment, and that the creditor will run the risk of its being paid." The judge said, "he was not sure that this latter member of the sentence varies the rule; if the paper is accepted in payment, by an express agreement, the risk of payment is, of course, on him who takes it."

In *Owenson v. Moore*, 7 Tenn. Rep. 64, it was held that, if the seller of goods takes notes or bills for them, without agreeing to run the risk of the notes being paid, and the notes turn out to be worth nothing, this will not be considered as payment.

Applying the well known rule of law upon this subject to the instruction which the court gave of its own motion, and it is manifest that the instruction is by far too broad. It states that if the witness, Skillman, assumed to pay the defendant's indebtedness to the plaintiffs, with the consent of the plaintiffs, and, in pursuance of that assumption, did execute and deliver to the plaintiffs his own promissory notes, which notes included the amount of the note of the defendant sued on in this case, they will find for the defendant. That is, that the bare receipt of the note of a third party will amount to payment of another's debt, whether the note thus received be paid or not. This is not the law; something more must be done before this becomes a payment. The accepted note or bill must, by the agreement of the parties, be taken expressly as payment, other-

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wise it is but payment *sub modo*; it is not an extinguishment or satisfaction of the debt until the note be paid; then it becomes a full payment and discharge. The parties must *intend* at the time, that the receipt of the note of such third person shall be a payment, shall extinguish the debt, or it will be a conditional payment; that is, a payment when the note is paid.

The court below erred, therefore, in giving the instruction complained of; its judgment must be reversed. We will not notice the matter about the opening or conclusion of the case before a jury. The other judges concurring, the judgment below is reversed, and the cause remanded.

MOORE, Respondent, *vs.* TURNER, Appellant.

1. On the trial of appeals from justices of the peace, declarations of law must be asked and exceptions taken, or the supreme court will not interfere.

Appeal from St. Louis Law Commissioner's Court.

In this case, which was commenced before a justice, the court below found the facts and declared the law arising upon them, according to the practice under the new code. No instructions were asked and no exceptions taken. After a judgment for the plaintiff, the defendant moved for a review of the law and evidence, which being overruled, he excepted and appeals to this court.

W. R. Biddlecome, for appellant.

Knox & Kellogg, for respondent.

RYLAND, Judge. In this case, no instructions were asked by the defendant on the trial of the appeal in the law commissioner's court—no exceptions saved to any act of the court previous to giving judgment for the plaintiff.

This court will not reverse the judgment in such cases. In trials before the law commissioner's court, upon appeals from

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a justice's court, the practice has been to ask instructions where you wish the court to give its views of the law of the case, and to save exceptions to those matters in which, as the parties think, error may have been committed.

Nothing, then, being saved properly, in this case, the judgment must be affirmed, Judge Scott concurring; Judge Gamble not sitting.

MILLIGAN & WIFE, Plaintiffs in Error, vs. DUNN, Defendant in Error.

1. *Martin v. White*, 11 Mo. Rep. 214, and *Starr v. Stewart*, 18 Mo. Rep. 410, affirmed.

Error to St. Louis Circuit Court.

A. Fenly, for plaintiffs in error.

H. N. Hart, for defendant in error.

RYLAND, Judge, delivered the opinion of the court.

Some time in January, 1849, Milligan and wife sued Dunn before John H. Watson, Esq., the law commissioner for St. Louis. In September, 1850, a trial was had and the jury found their verdict for the defendant. In October following, an appeal was prayed and allowed to the plaintiffs. At the November term of the Circuit Court, in the year 1852, on the 15th day of November, the case was called by the court for trial; the defendant appeared by his attorney, but the plaintiffs, the appellants, being called, came not, but made default. Thereupon, the court, on the defendant's motion, affirmed the judgment of the court below and rendered judgment for costs against the appellants and their security in the appeal bond.

1. The appellants afterwards moved to set aside this judgment of affirmance, which motion being overruled, they accepted, and bring the case here by writ of error.

The court of the law commissioner, at the time of the proceedings before him, in this case, was governed by the rules of procedure applicable to courts of justices of the peace, and was considered as a justice's court. Now, when appeals were taken from a judgment of the county court, or a justice of the peace, and the appellant failed to prosecute the same according to law, the judgment below must be affirmed and costs adjudged accordingly. See statute, costs, R. C. 1845, art. 1, sec. 16.

This court held, in the case of *Martin v. White*, 11 Mo. Rep. 214, that the 13th section of the 8th article of the act concerning justice's courts, which directs the Circuit Court to proceed to try the cause anew, must be understood as qualified by the 16th section of article one of the act concerning costs, and therefore only applicable to cases where the appellant is not in default. The decision, in this case, was afterwards recognized and approved by this court, in a late case at Jefferson City. *Starr v. Stewart*, 18 Mo. Rep. 410.

Indeed, the statute is positive ; it declares that, "In all cases, when an appeal from a judgment of the county court or a justice of the peace shall not be prosecuted by the appellant according to law, the judgment shall be affirmed.

The law commissioner's court, at that day, when this case was tried, being nothing more than a justice's court, governed by the same rules and regulations, this statute must operate on appeals taken therefrom, and consequently the judgment below, in this case, was properly affirmed by the Circuit Court.

In regard to the docket of the Circuit Court, and the admission of a loose piece of paper, which had been torn or broken off from the docket, after the calling of this case regularly, and on which the case appeared marked and docketed, this court will not interfere. It is entirely competent for the lower courts to know their own dockets, and whether the causes set down for any particular day, are marked on that day's docket or not. The other judges concurring, the judgment below is affirmed.

Joy v. Cooley.

JOY, Defendant in Error, *vs.* COOLEY, Plaintiff in Error.

1. An answer to a petition on a note which states that the defendant "paid the plaintiff two sums of money which extinguished the note," is sufficient under the code, the amount of the alleged payments exceeding the amount of the note.

Error to St. Louis Circuit Court.

T. T. Gantt, for plaintiff in error.

W. V. N. Bay, for defendant in error.

GAMBLE, Judge, delivered the opinion of the court.

Joy sued Cooley on a promissory note. Cooley answered that he made the note and that after the making thereof, he paid the plaintiff two sums of money, stating the dates and amounts of the payments, and that the last payment "extinguished the note." The amount of the two payments exceeded that of the note. The court struck out the answer and judgment was rendered for the plaintiff. The sufficiency of the answer is the only question.

1. It is true the answer does not state in terms that the defendant paid the note, but that the defendant made two payments to the plaintiff, the last of which extinguished the note. In construing pleadings under the code, where they are required to be verified by oath, it is not safe to assume that a defendant is prevaricating, because he does not answer in some set form of words. In the present case, if the payments were not made on account of this note, the defendant has sworn as falsely as he would if he had stated in his answer that he had fully paid and satisfied the note. Such is the meaning of his language, and the fact to be tried is the same as if the other form of expression had been employed. The answer should not have been stricken out.

The judgment is reversed, and the cause remanded.

Devinney v. Lay.

DEVINNEY, Defendant in Error, *vs.* LAY, Plaintiff in Error.

1. The indorser of a negotiable note is not a security within the meaning of the act concerning securities, (R. C. 1845,) and cannot, after payment of a judgment recovered against him and the maker, obtain judgment against a prior indorser upon motion, under the ninth section of that act.

Error to St. Louis Court of Common Pleas.

Devol brought a suit to the February term, 1852, of the St. Louis Court of Common Pleas, against the maker and indorsers of a negotiable note, and recovered judgment against all of them. John F. Lay and Pleasant Devinney were two of the indorsers and defendants in said suit. At the February term, 1853, Devinney, having paid the judgment and having given ten days' notice of his intended motion, moved for a judgment against the prior indorser, John F. Lay, for the whole amount paid by him, which was sustained. After an unsuccessful motion to set the judgment aside, Lay sued out a writ of error.

J. B. Goff, for plaintiff in error. The court erred in giving judgment against Lay, on motion, because, 1. The indorser of negotiable paper is not a security within the meaning of the act. *Clark v. Barret*, ante, 39. 2. Lay was not the principal debtor, who alone can be proceeded against by motion. R. C. 1845, ch. 161, §9.

Hart & Jecko, for defendant in error.

RYLAND, Judge, delivered the opinion of the court.

This case presents the question whether, under our statute concerning securities, one indorser of a negotiable note against whom the holder has obtained judgment, can, after payment of the judgment, recover against his co-indorser on motion merely, and notice thereof, for the amount so paid, with ten per cent. interest.

The plaintiff below relies upon the ninth section of the above statute, (R. C. 1845, p. 1000,) which is as follows :

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Sec. 9. "In all cases where judgment is given in any court, whether of record or not, upon any bond, bill or note, for the payment of money or delivery of property against the principal debtor and any security therein, and such security shall pay the judgment or any part thereof, he shall be entitled, upon motion, to a judgment in the same court against the principal debtor, for the amount he has paid, with ten per cent. interest thereon from the time of payment, together with costs."

The 10th section requires this motion to be made within one year from the rendition of the original judgment, and requires ten days' previous notice to be given in writing.

In the opinion of this court, the statute does not embrace the case of payment by one indorser so as to authorize him to obtain judgment against his co-indorser on a negotiable note, on motion. This case is fully within the principles decided by this court, at the last October term, in the case of *Clark v. Barrett*, and to the opinion therein given reference is had.

The judgment below must, therefore, be reversed, the other judges concurring.

SCHULTER'S ADMINISTRATOR, Plaintiff in Error, *vs.* BOCKWINKLE'S ADMINISTRATOR, Defendant in Error.

1. The supreme court will not interfere, where a plaintiff voluntarily submits to a nonsuit upon the refusal of the court below to strike out an insufficient answer.
2. The statutory proceeding against an administrator to enforce the specific performance of an agreement by his intestate to convey land, is permitted only where the contract is in writing. In other cases, the proceeding must be under the general law, and all persons having an interest in the land must be made parties.

Error to St. Louis Circuit Court.

This was a proceeding to enforce the specific performance of an agreement alleged to have been made by the defendant's intestate to convey to the plaintiff's intestate the unexpired

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term of a lease for ninety-nine years, of a lot in the Carondelet common. Accompanying the petition was a translation of the agreement purporting to have been made between the parties, but not signed by either of them. The petition stated that the plaintiff's intestate took possession of the land, in his life-time, under the agreement, and that the purchase money was all paid. The answer admitted the taking possession and the payment of the purchase money, but set up that there was no agreement in writing signed by the parties, as required by the statute of frauds, and that the suit should have been brought in the name of the heir and not of the administrator. The defendant claimed the same advantage from the defect of parties, as if he had demurred. The plaintiff moved for judgment on the answer, and his motion being overruled, he submitted to a nonsuit and brings the case here by writ of error.

S. A. Holmes, for plaintiff in error.

C. B. Lord, for defendant in error.

GAMBLE, Judge, delivered the opinion of the court.

In this case, the plaintiff, conceiving that the answer of the defendant admitted the material facts stated in the petition, and that he was entitled to a decree, moved for such decree, but the court overruled the motion. The plaintiff then came voluntarily and suffered a nonsuit, and having moved to set it aside, brings his case here by writ of error.

1. This court has entertained jurisdiction in cases where the Circuit Courts have, upon the trial of causes, decided questions which covered the plaintiff's case and obliged him to submit to a nonsuit. But when parties voluntarily suffer nonsuits, we do not interfere. If it was allowed to plaintiffs to take nonsuits on every motion they might make, and which the court might overrule, and then bring the case here to test the correctness of the decision upon the motion, this court would be filled with cases, in all different stages of progress, and every question of practice might be brought here to be settled before the merits of the

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case were reached. Although the court refused to give judgment on the answer, on the motion made by the plaintiff, there was still to be a hearing of the cause, and until that hearing, there could be no decision by which the plaintiff was obliged to take a nonsuit.

2. The defendant, in his answer, insisted that there were not proper parties made in the cause. The agreement between Schulter and Bockwinkle, stated in the petition, was, that Bockwinkle, for a certain consideration, was to assign to Schulter a term of ninety-nine years in a lot in Carondelet, which Bockwinkle held by assignment from the original lessee. The petition alleges that the consideration was paid, and that possession was taken and held under the agreement, and says that the terms of the agreement were reduced to writing, but does not allege that any memorandum of the agreement was signed, and the paper filed with the petition does not purport to be signed by the parties. Whether Bockwinkle left a widow and children does not appear. If he left a widow, she was entitled *prima facie* to dower in the property as real estate, (R. C. 430, sec. 1,) and unless the case were one which came within sections 36 and 42 of art. 3 of the administration act, the proceeding should have been against all parties having an interest in the property, under the general law, and not against the administrator alone. The special statutory proceeding for the specific execution of agreements against the administrators of vendors, is only allowed where the agreements are in writing. Sec. 36. This case does not come within that statute. The Circuit Court might then, with great propriety, decline giving judgment for the plaintiff on his motion, and if he desired to have his case decided upon the petition and answer, he should have waited until it came up regularly for hearing, and not voluntarily have suffered a nonsuit. The judgment is affirmed, with the concurrence of the other judges.

Miller v. Doan.

MILLER & MILLER, Defendants in Error, vs. DOAN, Plaintiff
in Error.

1. Prior to the taking effect of the Revised Code of 1845, the lien of a judgment was extinguished by the death of the judgment debtor.
2. An execution has never been allowed against the estate of a decedent in this state since May, 1, 1827.

Error to St. Louis Circuit Court.

A. Fenly, for plaintiff in error.

T. Polk, for defendants in error.

SCOTT, Judge, delivered the opinion of the court.

Doan, in November, 1844, recovered a judgment against B. M. Lisle in the St. Louis Circuit Court. Shortly after this, Lisle, who resided in Cole county, Missouri, died, after having made a will, whereby he appointed Thomas and Philip Miller his executors. At the time of his death, there was an execution in the hands of the sheriff on the judgment of Doan. On the 13th day of December, 1852, an alias execution was issued on the judgment, directed to the sheriff of Cole county. A motion to quash this execution was sustained by the court, and Doan, thereupon, sued out this writ of error.

1. For the reasons given in the case of *Prewitt v. Jewell*, 9 Mo. Rep. 732, by Scott, Judge, this court is of the opinion that the lien of a judgment was extinguished by the death of the judgment debtor, prior to the taking effect of the Revised Code of 1845, which expressly preserved such liens.

2. Never, since the first day of May, 1827, has an execution been allowed against a dead man's estate. The act of 30th December, 1826, prohibited this, and that prohibition has been in force ever since. When this execution issued, there was no lien existing. There was an absolute prohibition against the act, and the court did right in quashing the execution. The other judges concurring, the judgment will be affirmed.

Doan v. Lisle.—Davis v. Bowling.

DOAN Plaintiff in Error, vs. LISLE, Defendant in Error.

A. Fently, for plaintiff in error.

T. Polk, for defendant in error.

SCOTT, Judge. This is the case of J. P. Doan against T. & P. Miller, in another form. For the reason given in the case referred to, the judgment will be affirmed, the other judges concurring.

DAVIS *et al.*, Appellants, vs. BOWLING & ELY, Respondents.

1. In an action on a note made in another state, the burden of proof is on the defendant to show that the rate of interest on the face of the note is usurious.

Appeal from Hannibal Court of Common Pleas.

Richmond & Lakenan, for appellants, cited Story on Promissory Notes, §166-7 and notes. §181, 196. *Gordon v. Phelps*, 7 J. J. Marsh. 619. 4 ib. 238. *Hosford v. Nicholas*, 1 Paige's Rep. 226. 2 Kent's Comm. §39, p. 459-61.

Wm. M. Cooke, for respondents, cited *Leavenworth v. Brockway*, 2 Hill's (N. Y.) Rep. 201-3. *Allen v. Watson*, 2 Hill's (S. C.) Rep. 319-22. *Harrison v. Allnut*, 12 Louisiana, 465.

RYLAND, Judge, delivered the opinion of the court.

This was a suit by the plaintiffs against the defendants on a note executed by them to the plaintiffs in California. The note is as follows: "\$2176. One day after date, we promise to pay Davis, Mellon & Co., two thousand one hundred and seventy-six dollars, for value received, with two and a half per cent. per month interest on same till paid. Bowling, Ely & Co. Sacramento City, September 24, 1850. Per D. S. E."

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In their petition, the plaintiffs allege, that the note was made in the state of California, where all the parties lived at the time, and that, by the laws of the state of California, in existence when the note was executed, and still in existence, interest on money due at the rate of two and a half per cent. per month was not prohibited or made in any way illegal, and that the interest, as named in the note sued on here, was legal when and at the place where said note was executed.

The defendants answer, and set up several matters of defence, none of which is of importance, except that in relation to usury. On this subject, the answer is as follows: "They further say, that they do not know that two and a half per cent. per month was lawful interest in the state of California at the time of the making of said note, nor have they sufficient knowledge to enable them to form an opinion or belief, but they insist that said rate of interest is usurious, extortionate and unjust, and they demand that strict proof be required," &c. The bill of exceptions shows that the parties admitted that the note was made in California. After the evidence was closed, the plaintiffs asked the court to give the following instructions, numbered one and two:

1. That it devolves on the defendants, if they insist on usury, to show that two and a half per cent. per month was illegal interest at the place where the note sued on herein was executed.

2. The jury, should they find for the plaintiffs, must allow the plaintiffs interest on the note sued on herein, at the rate of two and a half per cent. per month, according to the face of the note, as the same is, in the absence of proof to the contrary, presumed to have been legal at the time and place where the note was made.

These instructions the court refused to give, the plaintiffs took a nonsuit, and afterwards moved to set it aside, which the court refused. The plaintiffs excepted, and bring the case here by appeal.

1. The defendants must be considered as setting up usury in

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their answer to this suit on the note, and the burden of proof rests upon them. He who pleads usury, in defence to an action on a note, takes upon himself to show the usury, and if he fail in his proof, he must suffer the consequences. The plaintiff, in such a case, is not bound to show, by proof, that there was not usury.

In the case of *Gordon v. Phelps*, 7 J. J. Marsh. 619, which was an action by Phelps against Gordon, in debt, upon a note executed and payable in New Orleans, stipulating for the payment of interest after maturity, at the rate of eight per cent. per annum, the court rendered judgment by default for principal and accruing interest, at the rate of eight per cent. The court of appeals of Kentucky held that, whatever might be the effect of a stipulation for such a rate of interest, on the face of a note executed in Kentucky, there was no pretence for giving any vitiating effect to it, when executed, as this was, in another state, whose laws, on that subject, are not made known to the court by appropriate pleading. The defendant was properly chargeable with interest, according to his agreement, up to the time of rendering the judgment, but there it should have stopped. The general rule is, that interest is to be paid on contracts, according to the law of the place where they are to be performed, in all cases where interest is expressly or impliedly to be paid. It is also a rule that interest is payable agreeably to the law of the place where the contract is made. Story on Prom. Notes, §166, 167. 1 Paige's Rep. 225. *Pawling's Adm'r v. Sartain*, 4 J. J. Marsh. 238.

The contract here was made in California; the note was payable one day after date; it may safely be said then, that it was to be performed there, as well as made there. On its face the interest was to be two and a half per cent. per month. The defendants allege this rate of interest to be usurious; it devolved on them, then, to prove the usury. Having failed to do so, the court should have given the instructions, as prayed for by the plaintiffs. The judgment must be reversed, and the cause remanded, the other judges concurring.

Bennett v. Robinson.

BENNETT & Co., vs. WOLCOTT, Plaintiff in Error, and ROBIN-
SON, Defendant in Error.

1. A party in possession of personal property under a purchase from a mortgagee is not rendered liable to garnishment on execution, as a debtor of the mortgagor, by the fact that the mortgage was not acknowledged and recorded, nor followed by the possession of the mortgagee, as required by the 8th section of the act concerning fraudulent conveyances, (R. C. 1845,) there being no fraud in fact. Whether the purchase was from the mortgagor or mortgagee, is a question of fact for the jury.

Error to St. Louis Circuit Court.

This was a petition in the nature of a bill of interpleader, filed by O. Bennett & Co., against Robert Robinson, jr., and John B. Wolcott. The claims of the respective defendants are stated in the opinion of the court. At the trial, the mortgage from Robinson 3d to Robinson, jr., was offered in evidence, and also the record of the judgment in favor of Robinson, jr., against the plaintiffs, for the price of the goods purchased by them, to the admission of both which Wolcott excepted. The date of the mortgage was November 1, 1850, and it was recorded November 5th, without being acknowledged, and was acknowledged November 23d. The goods were sold to plaintiffs November 20, 1850, and they were summoned as garnishees under the execution in favor of Wolcott against Robinson 3d, November 22, 1850. The mortgage purported to convey not only all the goods then composing the stock of Robinson 3d, but also those "which might be added thereto in the course of trade," at any time before default. There was no dispute, however, that the goods bought by plaintiffs were covered by it. It purported to be executed, not only to secure an indebtedness from the son to the father, but also to secure the father against contingent liability as indorser of the son. Robinson, jr., offered to show actual notice of the mortgage to Wolcott before the date of the sale to plaintiffs, but this evidence was excluded. Both Robinson, jr., and his son,

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were at the store where the goods were kept, at the time of the sale to plaintiffs. Under the instructions of the court below, the substance of which appears in the opinion of the court, there was a verdict and judgment awarding the money brought into court by the plaintiffs to Robinson, jr. Wolcott sued out this writ of error.

Knox & Kellogg, for Wolcott. 1. The mortgage was not valid against Wolcott, as a creditor of Robinson 3d, because not acknowledged before the plaintiffs were summoned as garnishees. R. C. 1845, ch. 67, §8. 16 Pick. 33. *Travis v. Bishop*, 13 Met. 304. 17 Wend. 494. 2. Wend. 596. 2. The record of the judgment of Robinson, jr., against the plaintiffs was not admissible against Wolcott, who was not a party thereto. 3. The mortgage from Robinson 3d to Robinson, jr., of all his stock and property, to secure against a *contingent* liability, allowing the mortgagee to dispose of the goods as he thought proper, without any security to the creditors that the goods would be faithfully applied, was void, as against the policy of our law regulating assignments. The attempt to cover subsequently acquired property is itself evidence of bad faith. 13 Met. 17, 29. 10 Met. 481. 4 Met. 395. 3 Met. 117. 2 Wend. 596. 4. By the terms of the mortgage, Robinson, jr., had no right to the possession of the property until some months after the sale to Bennett & Co. It does not appear that there had been any default on the part of the mortgagee at that time. 5. The mortgage provides that Robinson 3d should keep possession of the goods and sell as absolute owner, and this, of itself, renders it void. 6. Evidence to show actual notice of the mortgage to Wolcott was properly excluded.

T. T. Gantt, for Robinson, jr. Under the instructions given by the court below, in order to find for Robinson, jr., the jury had to find that the mortgage was not made in bad faith, and that Robinson, jr., sold and delivered the goods to the plaintiffs prior to the garnishment. The instructions necessarily included the idea of delivery to Robinson, jr., under

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the mortgage. The mortgage really cuts no figure in the case, because, Robinson 3d being indebted to Robinson, jr., it made no difference whether he delivered the goods to him in payment of the debt, or delivered them to a third party with the agreement that he should pay the price to Robinson, jr. So that, whether plaintiffs purchased the goods of Robinson, jr., or Robinson 3d, in neither case did they become the debtors of Robinson 3d.

Glover & Richardson, for O. Bennett & Co.

GAMBLE, Judge, delivered the opinion of the court.

In this case, the plaintiffs acknowledge themselves to be indebted for merchandise purchased by them, but state that the money is claimed by Robinson, jr., and by Wolcott, who is a creditor of Robinson 3d. They therefore file their petition, bringing in the claimants to interplead, in order that the plaintiffs may pay the money to the person entitled to it. Robinson, jr., who is the father of Robinson 3d, claimed to be a large creditor of his son. A mortgage was made by the son to the father for the merchandise in the store of the son, the condition of which allowed the son twelve months from its date to discharge the indebtedness, and upon his failure to pay, authorized the father to take possession of the property and dispose of it by public or private sale, for cash or on credit. This mortgage was executed, and was recorded without being acknowledged, and was afterwards acknowledged. It appeared in evidence that the father was in the store in which the merchandise was kept, for some two months previous to the sale made to the plaintiffs, and it was claimed at the trial that he sold the goods to the plaintiffs. Before the petition in this case was filed, he had sued the plaintiffs for the amount of the goods sold, and had recovered judgment against them.

Wolcott, the other defendant, obtained a judgment against Robinson, the son, and on the day after the sale to the plaintiffs, he issued a *fi. fa.* and the plaintiffs were summoned as

garnishees thereon. The date of the sale of the goods to the plaintiffs was after the mortgage from the son to the father, and after it was informally recorded, and before the execution of Wolcott was issued.

The instructions given by the court, on its own motion, told the jury that, if the mortgage was made with intent to hinder or delay the creditors of the son, it was absolutely void; but if it was a fair and *bona fide* transaction between the parties thereto, and if the father, acting under the authority conferred upon him therein, and to carry out the objects of the deed, sold and delivered to the plaintiffs property embraced in the mortgage, such sale and delivery passed the title to the plaintiffs, who became bound to the father for the price thereof, and the credit in their hands was not subject to be attached by the creditors of the son.

The instructions asked by Wolcott, as they appear upon this record, are so full of mistakes as to render some of them absurd. The first which was given, tells the jury that the authority given in the deed, to sell upon credit, and the sale to Bennett & Co., on credit, are circumstances tending to prove that the deed was void as to creditors of the son. The second instruction asked, which was refused by the court, must contain some mistake; for it is perfectly inconceivable that the counsel for Wolcott could have asked the court to tell the jury that, upon a certain state of facts, the credit in the hands of Bennett & Co. was not subject to be attached by the creditors of Robinson, the son, when he was himself, at the time of the trial, the only creditor of Robinson, the son, endeavoring to hold the fund by summoning Bennett & Co. as garnishees. So, in the fifth instruction, there is such confusion in the use of the names, Robinson, jr., and Robinson 3d, in the conclusion of the instruction, as to render the whole unintelligible.

The question of fraud in fact, in the transaction between the father and son, was distinctly put to the jury in the first instruction given by the court, and in the instruction given at the request of Wolcott, the court gives the jury the view of the

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law entertained by the counsel of Wolcott, in relation to the effect of the power given in the deed to sell upon credit.

1. The point which appears to have been most relied upon, arises upon the fact that, when Bennett & Co. were summoned as garnishees, the mortgage from Robinson, the son, to his father, had not been regularly recorded.

The eighth section of the act concerning fraudulent conveyances, declares that no mortgage or deed of trust of personal property, shall be valid against any other person than the parties thereto, unless possession of the property be delivered and retained by the mortgagee, trustee, or *cestui que trust*, or unless the instrument shall be acknowledged or proved and recorded in the county of the grantor's residence, in the same manner as is required by law in relation to conveyances of land. So far as this section is concerned, the mortgage in question was valid between the parties, at the time of the sale and delivery of the goods to Bennett & Co., and they were purchasers for valuable consideration, with possession of the goods. All the parties to this proceeding admit that the title passed to the purchasers, and as far as Wolcott is concerned, it would be fatal to his claim to deny that the title passed, for he can only proceed against a garnishee on a *fi. fa.*, who is a debtor of his debtor. *Vanwinkle v. McKee*, 7 Mo. Rep. 435. And if the title did not pass to Bennett & Co., then he cannot recover against them as garnishees. The eighth section of the statute was designed, as all other similar provisions in other statutes are designed, to protect the interests of third persons, acquiring an interest in, or lien upon the property mortgaged. It requires, in order to give notoriety to the transaction, either that possession shall be taken and retained, or that the mortgage shall be recorded, so that other persons, dealing with the property as the property of the mortgagor, may not be taken by surprise. The person who never acquires a right to, or a lien upon the property, has no interest in the question whether the deed of mortgage has been recorded or not. Here the sale to Bennett & Co. is to be taken, as to

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Wolcott on his garnishment, to be effectual to pass the title, and therefore, as the sale was before his execution issued, he never had any interest in the question whether the mortgage was recorded or not. The cases cited by the counsel for Wolcott are cases in which the title to the property mortgaged was involved, the parties claiming a right in the property against the mortgagee. In the present case, Robinson, the father, presents himself in the attitude of vendor of the goods, saying that he sold them to Bennett & Co., and the second instruction given by the court puts that, as a question of fact, to the jury. It is not the case of a sale by Robinson, the son, and the father coming in to claim the proceeds, under his mortgage; at least, Robinson, the father, asserts that it is not such a case, and there is evidence upon that point. In a case of this kind, it would have been improper, and would probably have misled the jury, to have given the instruction that the mortgage was invalid for want of being recorded, and for want of such possession as is described in the fifth instruction of the defendant, Wolcott. That the father claimed to be the seller of the goods, is shown by the fact that he sued Bennett & Co., and recovered in that character. While such recovery was not conclusive of the fact, as against Wolcott, it showed the foundation of his claim—the relation he professed to sustain to the plaintiffs. If Bennett & Co. then purchased from the father, they became his debtors, whether the mortgage was recorded or not. The real questions in the case were, whether the transaction between the son and the father was fraudulent as to the creditors of the son, and if it was not, whether the plaintiffs purchased the goods from the father or the son, and these questions were put to the jury in the instructions given. Wolcott can only, on his process, reach the proceeds of the sale, by showing that the son remained in the possession and sold the goods to the plaintiffs, so that they became his debtors.

The judgment in favor of Robinson, the father, against Bennett & Co., was objected to, when offered in evidence, but it is to be observed, that this very judgment is stated in the peti-

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tion of the plaintiffs, and this was a petition in the nature of a bill of interpleader, where each party was at liberty to show the condition of his own case. Moreover, the answer of Wolcott admitted the fact of the recovery, as the allegation in the petition was neither denied nor avoided.

The judgment is affirmed.

JOYAL, Respondent, vs. RIPPEY, Appellant.

1. It is settled that a certificate by recorder Hunt, under the act of 1824, is *prima facie* evidence of a confirmation by the act of 1812, and that an official survey is *prima facie* evidence of the true location of the land confirmed.
2. It is no impeachment of a survey, of a confirmation by the recorder of land titles under the act of 1824, that it includes less than the quantity claimed before the recorder. So, the mere fact that there is not enough land in a block to satisfy all the claims proved before the recorder, does not show that a survey of one of the lots, including less than the quantity claimed, is erroneous, or that the surveys of the other lots, including the full quantity claimed, are erroneous.

Appeal from St. Louis Court of Common Pleas.

This was an action brought by Theresé Joyal in 1851, to recover ten feet of ground fronting on Third street, in block 55 of the city of St. Louis, in the possession of Matthew Rippey. The plaintiff claimed the ground by devise from her husband, Joseph Joyal, as a part of a lot of sixty feet, French measure, in front, by one hundred and fifty feet in depth, confirmed to him by the act of congress of June 13, 1812. The defendant denied that the ground in dispute was within the lot confirmed to Joyal by the act of 1812, and averred that it was included in a lot of 120 feet front by 150 feet deep, French measure, inhabited, cultivated and possessed by Nicholas Beaugenon, prior to December 20, 1803. The answer set out a chain of title from Beaugenon to the defendant, as one link of which, a deed from the widow Charleville to Pierre Chouteau was mentioned.

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At the trial, the plaintiff read in evidence a certificate of confirmation from Theodore Hunt to Joseph Joyal, dated April 15, 1825, of a lot of 60 feet front on Third street, by 150 feet deep, French measure, and a United States survey thereof, which includes the land in controversy. By the survey, the lot is described as 60 feet 4 inches in front, on Third street, by 60 feet 6½ inches in width, in the rear, bounded west by Third street, north by lot of Ralph Davis, south by Joseph Quenel, and east by Bouché under Quenel. Antoine Smith, a witness for the plaintiff, gave evidence tending to show that Joyal was in possession of an inclosed lot, including the ground in controversy, for more than twenty years before 1840, and that, about that time, the defendant removed the division fence further north, so as to include the ground in dispute within his lot, and that this was done against the consent of Joyal, who shortly afterwards died. This witness also testified that Joyal bought the lot of La Riviere, who bought it of Rousseau *dit* La Bouté, who obtained it from the widow Charleville by an exchange. The will of Joyal, devising the lot to the plaintiff, was read in evidence.

The defendant gave no evidence of the possession of Beaugenon prior to December 20, 1803. He read a deed from Beaugenon to the widow Charleville, and other deeds referred to in his answer, but the deed from widow Charleville to Chouteau does not appear in the record. He then read from the registry of Recorder Hunt a confirmation to Ralph Davis' legal representatives of a lot of 120 feet front, by 300 feet deep, French measure, described as bounded east by Second street, west by Third street, north by south D. street, and south by balance of square. No survey of this confirmation was given in evidence. A certificate of confirmation, dated January 7, 1842, from F. R. Conway to Joseph Quenel's legal representatives, of a lot included in Hunt's list, was next given in evidence. This certificate described the lot as 60 feet front on Second street, by 300 feet deep to Third street, French measure, but referred for a more particular description to an ac-

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companying United States survey thereof, which described it as 54 feet 10½ inches front on Third street, by 61 feet 2 inches on Second street, bounded north by Joyal and Bouché under Quenel, and south by Almond street. This survey did not include the ground in dispute. The confirmation to Bouché, under Quenel, if any, was not in evidence. There was evidence tending to show that there was not sufficient land in the block to satisfy the calls of all the claims before the recorder for front on Third street, by some ten or twelve feet. There was evidence tending to show that Joyal and Rippey, in 1839, agreed upon a division line, nearly, if not quite, corresponding with the present possession of the parties, and evidence to the contrary.

The court gave the following instructions :

1. If Joyal did not agree to the line claimed by the defendant as the division line, or if he did not assent to, or acquiesce therein, or if Rippey did not use, possess and occupy according to said line, without disturbance or opposition from Joyal and his legal representatives, then the plaintiff is not estopped from claiming south of said line. To make said line conclusive between the parties, Rippey must have used and occupied according to it, without disturbance or opposition from Joyal and his representatives, long enough to show that Joyal and his representatives knew where the line so agreed upon was, and that they acquiesced in it as the settled division line between them and the defendant.

2. The certificate of confirmation, offered in evidence by the plaintiff, is *prima facie* evidence that the land therein named was confirmed by the act of June 13, 1812, and the United States survey, No. 3213, is *prima facie* evidence of the true location and boundaries of the tract confirmed. If the jury believe from the evidence, that the defendant was in possession of any portion of the tract included in said survey, at the commencement of this suit, and that the plaintiff is the Aglaé Joyal mentioned in Joseph Joyal's will, they will find for the plaintiff, unless the defendant has proved to their satisfaction

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that the said survey did not correctly locate said tract, as cultivated, inhabited or possessed prior to December 20th, 1803, and that the true location would not include any part of the land in possession of the defendant at the commencement of this suit.

3. If the jury believe from the evidence, that Joyal and Rippey mutually agreed upon the division line between them, and that, according to said division line, the parties used and possessed and occupied their respective lots, with the assent and acquiescence of each other, or that the defendant used and occupied up to said division line, with the acquiescence of, and without disturbance from Joyal and his representatives, for many years after said alleged agreement, then the plaintiff cannot recover any land south of the line so agreed upon as the division line.

4. If the jury find that the plaintiff is the widow of Joseph Joyal, and the same person as Aglae Joyal, named in the will of said Joseph, and that said Joseph and those under whom he claimed, were in possession of the property in dispute for more than twenty years before Rippey took possession thereof, they will find for the plaintiff.

5. The defendant admits by his answer that he took possession and now holds possession of ten feet in front by 150 feet in depth, and defendant is estopped from showing any thing contrary to and conflicting with his answer.

The court refused to give the following instruction, asked by the defendant :

“The jury are to ascertain from the evidence the true location of the premises claimed by the parties respectively, and if they find that there is a deficiency of land in the block to satisfy all the confirmations of the same date, the four lots in the block should be equally divided, and one given to each of the parties in this case, if the jury find that there has not been any agreement as to lines, as stated in prior instructions, and no adverse possession for twenty years, as also stated in previous instructions. In other words, if the survey was now to

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be made, independent of these circumstances, such would be the correct rule."

After a verdict and judgment for the plaintiff, the defendant appealed.

J. R. Shepley, for appellant, argued that the instruction refused should have been given. The court had previously declared that the survey was only *prima facie* evidence of location, and now it was asked to say what was the correct principle to be applied in surveying the lots, when there was not sufficient ground to satisfy all. The principle contained in the instruction is belived to be the correct one. The titles all had an equal standing, and there was no reason why one should get the full quantity of his claim, as proved up before the recorder, any more than another.

C. Gibson and *B. Bates*, for respondent. The certificate was *prima facie* evidence of a confirmation to Joyal by the act of 1812, and the survey was *prima facie* evidence of the true location of the lot confirmed. The surveys had fixed the bounds of the lots, and the principle of the instruction could only apply to the making of the surveys. The rights of the parties were to be determined by a comparison of their titles, without regard to the titles to other portions of the block. The defendant showed no title under any confirmation, and was not in a position to interfere in the division of the block into lots. Again, the defendant, having taken forcible possession of the ground in dispute, cannot set up a merely equitable principle (if it be one at all) in his defence. Let him restore the possession before he asks equity.

GAMBLE, Judge, delivered the opinion of the court.

The answer of the defendant alleges that the ground in controversy was included in a lot of 120 feet in front by 150 feet in depth, French measure, which was inhabited, cultivated and possessed prior to the 20th December, 1803, by Nicholas Beaugenon, having its front on Third street, and bounded on the south by Almond street. Of this possession, no evidence is

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given, and there does not appear to have been any action before the recorder of land titles under the act of 1824, to prove the extent and boundaries of such possession. In the answer, the defendant sets up, as part of his title, a deed from widow Charleville to Pierre Chouteau, and in the evidence, an exchange between widow Charleville and Rousseau *dit* La Bouté is mentioned, but neither of these deeds is on the record. We must take the case as we find it, and decide it as the parties have prepared their record.

The certificate of confirmation, in favor of Joyal, and the United States survey, under the confirmation, are admitted to include the premises in controversy, and make out a *prima facie* case in favor of the plaintiff, with the will of Joyal, devising the property to the plaintiff. This is resisted by giving in evidence the certificate of confirmation in favor of Quenel's representatives, and the survey under it. The defendant did not claim under Quenel by any title set out in the case, but made it the basis of the instruction which he asked, and which presents the only question argued by his counsel. That instruction declares the law to be that, if there was a deficiency of land in the block to satisfy all the confirmations of the same date, the four lots in the block should be divided equally, and one given to each of the parties in the case, unless there was an agreement as to lines, or an adverse possession of twenty years controlling the division. Such is the substance of the instruction asked by the defendant and refused by the court.

It is to be remembered that the certificates of confirmation, issued by the recorder, under the act of 1824, do not, in themselves, profess to be documents transmitting title. They are received in court as *prima facie* evidence that the lot described was cultivated or possessed prior to the 20th December 1803, and was confirmed to the claimant by the act of June 13th, 1812. *McGill v. Somers & McKee*, 15 Mo. 86. So the surveys made under the reports and lists of the recorder, returned to the surveyor general as directed by the act of 1824, are *prima facie* evidence of the true location of the lot as

possessed prior to the 20th December, 1803, and confirmed by the act of 1812. If there should be a conflict between the certificates and surveys of two contiguous lots, the parties would be remitted to the proof of their possession prior to December, 1803, and by evidence going back behind the proceeding of the recorder, it would be determined what land was confirmed by the act of 1812 to each. The surveys in the present case do not conflict, for they call for each other, and the line between the lots is established by them, so far as the surveys of the United States could have that effect. It is true that the proceeding before the recorder, in relation to the claim of Quenel's representatives, is for a lot of sixty feet in front by three hundred feet in depth, and that the survey which forms a part of the certificate of confirmation, gives a front of sixty feet and two inches on Second street, and only fifty-four feet ten and a half inches on Third street. But as there was no evidence in the case of the actual possession, prior to the 20th December, 1803, nor of the nature and extent of the original claim, it is impossible to say that the survey is erroneous because it does not contain the quantity claimed before the recorder. Suppose the case that the actual ancient possession had encroached upon the street, which was the southern boundary of the lot, to the extent of the present alleged deficiency, could the party claim that, when the street was surveyed, so as to include a part of the possession, his lot should be projected the same distance to the north upon the contiguous lot of his neighbor? Undoubtedly not. This is mentioned merely to show that the survey may be correct when the party fails to get the quantity he claimed; and so it will follow that the mere fact that there is a deficiency of land in the block, when its limits are accurately ascertained, to satisfy all the claims asserted and proved before the recorder, does not show that the survey of the Quenel lot, giving to it less than the sixty feet front, on both streets, is an erroneous survey, or that the surveys of the other lots in the block, by which they get their quantity, are erroneous.

As the certificates of the recorder, and his proceedings under

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the act of 1824, do not originate titles, we must have the evidence of the original claims and possessions before us, before we can declare that all the surveys in a block are erroneous, because one of the parties has a smaller quantity surveyed for him than he claimed before the recorder. The instruction asked by the defendant was substantially an instruction that all the surveys in the block were incorrect, and the only ground for such declaration was, that the Quenel lot was smaller, as surveyed, than the quantity claimed before the recorder, and there was a deficiency in the block to satisfy all the claims made before that officer. Upon the state of the evidence, the instruction was properly refused.

The instructions given by the court, upon the effect of the certificates of confirmation and surveys, and upon the effect of an agreement between the parties, in relation to the division line between them, were correct, according to previous decisions of this court. So, also, the instruction in relation to Joyal's possession of the ground for twenty years previous to the ouster by the defendant, was correct.

The judgment will be affirmed.

WALTON, Plaintiff in Error, *vs.* WALTON, Defendant in Error.

1. The supreme court will not interfere with the discretion exercised by inferior courts in taxing costs against a losing party.

Error to St. Louis Court of Common Pleas.

This case was once before in this court, and was reversed and remanded. (17 Mo. Rep. 376.) After it went back to the court below, the defendant was allowed to amend his answer by inserting an additional item for money paid since the former judgment, for which he claimed to be credited in taking the account. The cause was again referred, and the referee reported a balance in favor of the defendant, which report was

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confirmed. Afterwards, the plaintiff moved the court to tax the costs against the defendant, because the item which accrued after the commencement of the suit had been taken into consideration in stating the account, when there would otherwise have been a balance in favor of the plaintiff. His motion was overruled, and he sued out this writ of error.

E. Casselberry, for plaintiff in error.

Krum & Harding, for defendant in error.

RYLAND, Judge, delivered the opinion of the court.

This case has been in this court at a previous term ; it was reversed and remanded. See the case, 17 Mo. Rep. 376. It now comes here again, and the only matter for our consideration is in regard to the costs. The defendant below obtained a judgment for a small sum ; and as the costs in such cases as this are in the discretion of the court, we will not reverse the judgment that gives costs against the losing party.

“In all civil actions or proceedings of any kind, the party prevailing shall recover his costs against the other party, except in those cases in which a different provision is made by law.”

“Upon the complainant dismissing his bill in equity, or defendant dismissing the same for want of prosecution, the defendant shall recover against the complainant his costs ; and in all other cases in equity, it shall be in the discretion of the court to award costs or not, except in those cases in which a different provision is made by law.” R. C. 1845, tit. Costs, art. 1, secs. 6 and 18.

The complainant contends that the act of the court, in permitting defendant to file an amended answer, was the basis for the success of the defendant in the action, and therefore the court should have made the defendant pay a portion of the costs. This may be strictly just and equitable ; but still it does not take away the discretionary power of the court below. The question here is, not what this court would have done in the

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premises, had the case been before us, as a court of original jurisdiction, but whether the court below has abused its discretion. We are not willing to say that there has been an abuse of such discretion in giving costs for the defendant in this action. The other judges concurring, the judgment below will be affirmed.

MUNFORD, Defendant in Error, *vs.* WILSON *et al.*, Plaintiffs
in Error.

1. Upon an inquiry of damages after a judgment by default upon a *quantum meruit* or *indebitatus* count by an attorney for services rendered, evidence of a contract is not admissible, nor can it be shown, for the purpose of increasing the amount of the recovery, that by the contract, the fee depended upon a contingency.
2. Where a defendant upon whom an order for the production of a paper is made, answers that the paper is in the hands of a third party, by whom it is held for defendant and others, but does not state that the paper is not under his control, it is no error for the court to take the contents of the paper, as stated by the plaintiff in his petition to be true.

Error to St. Louis Court of Common Pleas.

The facts sufficiently appear in the opinion of the court when the cause was formerly here, (15 Mo. Rep. 557,) and in the opinion which follows.

C. B. Lord and *C. Gibson*, for plaintiff in error. 1. The court below erred in deciding that it stood admitted that the paper referred to in plaintiff's petition for the production of papers, was executed, and that its contents were truly stated. The affidavit was sufficient to excuse the parties from contempt. The paper was illegal evidence, and if the parties were in contempt, the court could not punish it by admitting illegal evidence. New Code, §4, art. 24. 2. It was error to permit Munford to prove what his services were worth, if he was only to be paid in case of success. He was suing for what his services were reasonably worth, and could not be permitted to

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show any contract that he was only to be paid upon a contingency. If there was a special agreement he should have declared upon it. 3. The court erred in allowing the contract to go to the jury, as the plaintiff sued upon a *quantum meruit*.

T. Polk and M. L. Gray, for defendant in error. 1. The court was authorized to make the order it did in regard to the contents of the paper being admitted. Art. 24, §4 of new code. The defendants were in contempt, and the course adopted by the court was less severe upon the defendants than it would have been authorized to adopt. 2. The court properly told the jury that they were authorized to take into consideration the fact that the plaintiff's fee was contingent, in fixing the value of his services. His petition was not, strictly speaking, a count upon a *quantum meruit*. It was for an indebtedness to a specified amount. Even if it was technically a count upon a *quantum meruit*, still, whatever affected the value of the services was admissible. 3. The contract was not admitted as the basis of the plaintiff's claim, but the jury were told that it was merely to be regarded as evidence tending to show what the parties whose names are signed to it, estimated would be the value of the plaintiff's services.

SCOTT, Judge, delivered the opinion of the court.

This case was once before in this court, and will be found reported in the 15th volume Missouri Reports, 540. When here, it was remanded, in pursuance to an agreement that, if it should be determined that the plaintiff was not entitled to recover on the special contract, he should have leave to amend and declare upon a *quantum meruit*. This court, entertaining the opinion that no recovery could be had upon the special contract, the judgment was reversed and the cause remanded, to be proceeded on in pursuance to the agreement above recited. After the cause was sent back, there was a count in *indebitatus assumpsit* or a *quantum meruit* filed as a petition, and on it there was a judgment by default. The proceedings sought to be reviewed here, occurred whilst executing a writ of

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inquiry. One of the witnesses was asked what the plaintiff would deserve to have for his services if he was only to be paid in the event of success? This course of examination was objected to by the defendants, but their objections were overruled, and they excepted. A similar course was pursued in the examination of most of the witnesses, against the objections of the defendants. The plaintiff offered in evidence a contract signed by the defendant, C. Hempstead, and her daughter, in which they agree to give to Albert Todd and the plaintiff, as a compensation for their services in prosecuting their suit, one-third of the amount they should recover. Todd, before the services were rendered, gave up this contract, and assigned it to the plaintiff, Munford. Exceptions were taken to the reading this paper. The suit which Munford prosecuted was compromised for \$8,000, paid to the defendants, without the knowledge or consent of Munford. This action is to recover the value of Munford's services in that suit, and for "other benefits."

There was an order on one of the defendants to produce a paper alleged to be in her possession. In excuse for non-compliance with the order, said defendant stated that the paper was in the hands of another, held by him for her and the other defendants, and partly for other persons. Upon this, it was ordered, that the contents of the paper, as stated by the plaintiff, be taken as true.

The court gave the instructions which follow. 1st. If the jury believe from the evidence, that the plaintiff's fee was contingent, and that the contingency would affect the value of his services or the reasonable compensation which he ought to have for said services, then they may take that into consideration in fixing the compensation in this case. 2. It is for the jury to determine from the evidence, what the services of the plaintiff, set out in his amended petition, are reasonably worth.

The paper signed by Cornelia Hempstead and Cornelia V. Hempstead, offered in evidence, is not the basis of any claim of the plaintiff in this case, nor a valid subsisting contract, upon which the plaintiff has a right to recover here. It is for

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the jury to consider it merely as evidence, tending to show what the parties, whose names are signed to it, supposed or estimated would be the value of the services that would be required of the parties therein named, concerning the matters stated in said paper. The nature, character and extent of the services are to be considered, and it is for the jury to say what they were reasonably worth, under all the circumstances under which they were rendered. 3. If there has been any thing paid to the plaintiff for his services, set out in the petition, the jury will deduct such payments, leaving entirely out of view the idea that there was any other agreement than that the plaintiff should receive for his services what they were reasonably worth.

There was a verdict for the plaintiff for the sum of \$3119 84. After a motion for a new trial, the defendants brought the case here.

1. The general rules in England regulating pleadings in the several actions, virtually abolished the *quantum meruit* count. Before the formation of those rules, it was the opinion of the profession, that the *quantum meruit* count was unnecessary, as under the *indebitatus* count the plaintiff may recover, although there be no evidence of a fixed price. 1 Chitty, 374. The parties went into this trial under a stipulation, that there was no agreement as to the value of the services of the plaintiff. Under this view of the case, it is not deemed material whether the count is *indebitatus assumpsit* or a *quantum meruit*. It was evidently treated by the court, as it may be ascertained from the instructions given, as a count on a *quantum meruit*.

It is difficult to ascertain the principle by which the court below was governed in the execution of the writ of inquiry awarded in this cause. Whether the count was a *quantum meruit* or *indebitatus assumpsit* no rule would authorize the admission in evidence of the contingency of the payment, as an element in calculating the value of the services of the plaintiff. In executing a writ of inquiry, after a default on an *indebita-*

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tus count for services rendered, the only inquiry is as to the value of the services rendered. It would be unfair to ask what would the services be worth, provided they were only to be paid for in the event of their being successful, and making that a basis for estimating their value. Such a question assumes that there was a contract relative to the services, when the form of the pleading does not justify such an inference, and it is moreover repelled by an express stipulation of the parties. If the question does not assume that there was a contract between the parties relative to the services, then it is totally irrelevant, and, as its answer might mislead the jury, it should not have been put. This whole proceeding was conducted in violation of the rules of law and against the agreement of the parties, from beginning to end. It is useless to attempt to uphold such verdicts. The admission of the contract between the defendants and Todd and the plaintiff, was evidently calculated to mislead the jury, and was in violation of the agreement under which the suit was tried. When the nature of the inquiry before the jury is considered, there is no principle on which its admission could be justified.

As the affidavit of C. Hempstead did not state, with sufficient clearness, whether the agreement sought to be read in evidence was under her control or not, and as it did not appear but that it was in her power, though in the hands of another, there was no error in the court in ordering its contents, as stated by the plaintiff, to be taken as true.

The instructions given by the court were clearly erroneous. The first and second instructions conflict with each other. The first directed the jury that, if they believe from the evidence, that the plaintiff's fee was contingent, and the contingency would affect the value of his services, then they might take that into consideration, in fixing the compensation of the plaintiff.

In the second instruction, the jury was informed that they were to consider the nature, character and extent of the plaintiff's services, and determine what they were worth from the evidence, leaving out of view that there was any other contract

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between the parties than that the plaintiff should be paid what they were reasonably worth. Let it be borne in mind, that the only count in the petition was one in *indebitatus assumpsit* or a *quantum meruit*. The court says it was a *quantum meruit*, and by agreement, the case was to be tried on such a count. It would be a useless waste of time to show the inconsistency of these two instructions, and considered in reference to the subject of inquiry before the jury, the first was erroneous. It could only have any support in reason or law, on the supposition that there was a special contract that the plaintiff should only be paid in the event he was successful in the prosecution of the suit. The second affirms that there was no other contract between the parties than that the plaintiff should be paid what his services were worth. In one instruction, the jury are told, if the fee to be paid was contingent, they may regard that circumstance in fixing the value of the services. In another, they are directed that there was no such contract as that contemplated in the preceding instruction. The first instruction was not withdrawn, as it should have been, when the last was given, but they both went to the jury, and, so far from directing, they served only to confound and perplex, and left them in uncertainty as to the real matter about which they were deliberating.

The other judges concurring, the judgment will be reversed, and a new writ of inquiry awarded.

THE STATE, Respondent, *vs.* EDWARDS, Appellant.

1. A party indicted is not a competent witness for another party jointly indicted.
2. A conviction cannot be shown by parol evidence; nor can a judge take judicial notice of a conviction before him in another county in the same circuit.
3. The omission of the word "did" in an indictment for a misdemeanor, before the words "assault, beat and maltreat," held not fatal, and the addition of the words "with intent," held mere surplusage.

State v. Edwards.

Appeal from Washington Circuit Court.

Wm. Edwards and others were indicted under the sixth section of the seventh article of the act concerning crimes and punishments, (R. C. 1845.) The indictment is set out in the opinion of the court. Before trial, Wm. Edwards applied for and obtained a change of venue to Washington county. Other defendants took a change of venue to other counties. At the trial of Edwards, he called as witnesses two of the parties who were indicted with him. He offered to show by oral testimony that a *nol. pros.* was entered as to one, and it was admitted to be within the knowledge of the court that the other had been tried and convicted in another county in the same circuit. The court refused to permit them to testify, no record being produced. The defendant was convicted, and after motions for a new trial, and in arrest of judgment, appealed to this court.

J. G. Beal, for appellant.

D. Q. Gale, for the State.

RYLAND, Judge, delivered the opinion of the court.

In this case, there are several minor questions which I will dispose of, before I mention the only one of any importance. In the first place, the persons whom the defendant introduced and wished to have examined as witnesses for him, were properly excluded by the court. They were parties to the indictment—co-indictees, and as such were not competent witnesses for their fellow-defendant. The defendant's counsel offered to prove, by parol evidence, that one of these persons had been convicted, and to the prosecution against the other a *nolle prosequi* had been entered, and contends, in this court, that the court below ought to have admitted these persons as witnesses, because the fact of the conviction of the one, and a *nolle prosequi* as to the other, were known to the court before which this trial was going on; the judge thereof having been the same judge before whom, as a court in another county, these proceed-

ings were had. To state this proposition, is enough to make the absurdity thereof apparent.

As to the objections taken to the instructions given for the State, they are untenable. All the defendant's instructions were given, and nothing now remains to be considered except the motion in arrest, on account of the indictment. The main question, therefore, in the case, arises upon the sufficiency of the indictment. This indictment is as follows :

“ State of Missouri, county of St. François. In the Circuit Court, November term, A. D. 1852. The grand jurors of the state of Missouri, empaneled, sworn and charged to inquire within and for the body of the county of St. François aforesaid, upon their oath present, that Jesse Edwards, John B. Clardy, William Edwards, Jackson Edwards, John Freeman and William Nelham, all late of the county of Ste. Genevieve, heretofore, to-wit, on the third day of November, in the year of our Lord one thousand eight hundred and fifty-two, with force and arms, at and in the county of St. François aforesaid, did unlawfully, riotously and routously assemble and gather together, to the number of three or more persons, with intent then and there, with force and violence, in a violent and turbulent manner, to do an unlawful act, that is to say, with force and violence, unlawfully and in a violent and turbulent manner, to assault, beat and maltreat one Stephen L. Page, and being so assembled and gathered together, unlawfully, riotously and routously, with intent then and there, with force and violence, in a turbulent and violent manner, assault, beat and maltreat one Stephen L. Page, in the peace, then and there being, and other wrongs to the said Stephen L. Page, then and there unlawfully, with force and violence, and in a violent and turbulent manner, did, to the great terror and disturbance of all the good people of St. François county aforesaid, then and there being, in contempt of all law, to the evil example of all persons in like cases *pending*, contrary to the form of the statute, in such case made and provided, against the peace and dignity of the state of Missouri.”

This indictment is drawn in a careless manner, without regard to that precision and professional accuracy which should always be used in the preparation of such instruments. Indeed, it is a source of painful regret, to notice the general want of skill so often manifest before us, in criminal cases, in the drawing of indictments. This, no doubt, often happens from the haste with which such matters are prepared on the circuits, and from the want of books and other conveniences necessary for the calm and deliberate performance of such duties.

The omission in this indictment consists of the neglect to insert the word "did" before the words "assault, beat and maltreat one Stephen L. Page, in the peace then and there being, and other wrongs," &c., so as to make the sentence read thus: "With force and violence, in a turbulent and violent manner, "did" assault, beat and maltreat," &c. We are inclined to think that this word "did" may, in this indictment, be supplied by intendment.

In indictments for misdemeanors merely, such intendment is often resorted to. The strictness and rigor in the construction of indictments for felonies, are not applied uniformly to indictments for mere misdemeanors. In the case of the *State v. Halder*, 2 McCord, 377, the omission to insert the word "did" before the words "feloniously utter and publish, dispose and pass" was held fatal, and the judgment was arrested. This indictment was for a felony.

In the case of the *State v. Whitney*, 15 Ver. 298, which was an indictment for a misdemeanor, selling liquor by the small measure, without license, the word "did" was omitted, which should have been joined with the words "sell and dispose of." This omission was held not to be fatal on motion in arrest of judgment. Bennett, J., in delivering the opinion of the court, said: "In this indictment, it is alleged that the respondent, on the first day of August, A. D. 1842, at, &c., sell and *dispose* of, &c. It is evident the omission is purely a clerical one; the auxiliary verb may be supplied by intendment."

There was no necessity to supply this auxiliary verb, "did," before one of the verbs used in this sentence above quoted, viz: the verb, "beat." Leaving out the words "assault and maltreat," and using the verb, "beat," alone, and the charge is positive and direct. The words in the beginning of this sentence "with intent," may be rejected as surplusage; they do not injure the indictment, being no part of the description of the offence, and may be stricken out, leaving the offence full and complete. But it is very clear that the words "assault, beat and maltreat" express all the action which is imputed to the defendant, and no one can misapprehend their sense in the connection in which they are used, and the helping verb will at once be supplied by intendment. In the case of the *King v. Stevens & Agnew*, 5 East, 260, Lord Ellenborough said: "If the sense be clear, nice exceptions ought not to be regarded." In respect of this, Lord Hale says, (2 Hale P. C. 193;) "more offenders escape by the over easy ear given to exceptions in indictments, than by their own innocence, and many heinous and crying offences escape by these unseemly niceties, to the reproach of the law—to the shame of the government, and to the encouragement of villainy, and the dishonor of God."

Upon the whole, it is the opinion of this court, that the judgment below be affirmed; and, the other judges concurring, it is affirmed accordingly.

THE STATE, Respondent, *vs.* MAGRATH *et al.*, Appellants.

1. *Jennings v. State*, 9 Mo. Rep. 862, affirmed.
2. Time is not material in an indictment under the 38th section of article 2 of the act concerning crimes and punishments, (R. C. 1845,) so that the offence is alleged and proved to have been committed before the finding of the indictment, and within one year before.

Appeal from St. Louis Circuit Court.

The defendants were indicted under the 34th and 38th sections of article 2 of the act concerning crimes and punishments,

State v. Magrath.

(R. C. 1845.) The indictment contained three counts. The third, upon which alone the defendants were convicted, was framed upon the 38th section, and was as follows :

“ And the grand jurors aforesaid, upon their oath aforesaid, do further present that John Magrath, &c., on, &c., at, &c., with force and arms, in and upon one Jeremiah Ryan, in the peace of the state then and there being, feloniously did make an assault, and that they, the said John Magrath, &c., with certain stones and brickbats, each of the length, &c., which they, the said John Magrath, &c., in their right hands then and there had and held, the said Jeremiah Ryan, then and there feloniously, wilfully and by their act and procurement, did beat, batter, bruise, wound and contuse, giving to him, the said Jeremiah Ryan, then and there, with the stones and brickbats aforesaid, in and upon the head and side of him, the said J. R., divers wounds, bruises and contusions, each of the length, &c., and so the jurors aforesaid, upon their oath aforesaid, do say that the said J. R., then and there, in manner and form aforesaid, was wounded, disfigured, and did receive great bodily harm by the felonious act of them, the said John Magrath, &c., against the peace,” &c.

A motion to quash this count was overruled. The indictment charged that the offence was committed on the 1st of July, 1853. The proof was that it was committed on the first Sunday after the 4th of July. After a conviction upon the third count, the defendants moved for a new trial and in arrest of judgment, which motions being overruled, they appealed to this court.

Blennerhasset & Shreve, for appellants. 1. The third count was insufficient. 2. The offence was proved to have been committed after the time laid in the indictment. Time is material, because the offence is barred by statute, unless the indictment is found within one year after its commission. (R. C. 1845, p. 895, §25.)

H. A. Clover, for the State. 1. The third count was sufficient, as decided by this court. 9 Mo. Rep. 863. 2. Time is not material, if the offence proved was committed within one year before the finding of the indictment.

State v. Fulton.

RYLAND, Judge. 1. The main questions in this case have substantially been passed upon by this court, in the case of *Jennings v. State*, 9 Mo. Rep. 852. This court will not disturb the decision in that case, and it must govern this.

2. The point about the time is not well taken. It is not important, as to what day is alleged or what day is proved, so that the time in the indictment is within the period prescribed for limiting the prosecution, and the proof is of a day before the finding of the bill of indictment by the grand jury, and within the period prescribed for limitation.

The judgment must be affirmed, Judge Scott concurring; Judge Gamble not sitting.

THE STATE, Appellant, *vs.* FULTON & WILLIAMSON, Respondents.

1. In an indictment under the 15th section of article 8 of the act concerning crimes and punishments, (R. C. 1845,) for enticing and permitting persons to play upon a gambling device, kept by the defendant, it is not necessary to allege that *money* or *property* was bet, won or lost. An indictment which follows the language of the statute is sufficient.

Appeal from St. Louis Criminal Court.

H. A. Clover, for the State.

G. W. Cline, for respondents.

RYLAND, Judge, delivered the opinion of the court.

At the January term of the St. Louis Criminal Court, in the year 1854, the defendants were indicted for setting up and keeping a faro bank. They appeared and moved to quash the indictment. Their motion was sustained, and the indictment quashed. The circuit attorney excepted and brings the case here by appeal.

The indictment is as follows :

“State of Missouri, county of St. Louis, ss. St. Louis Criminal Court, January term, 1854. The grand jurors of the state of Missouri, within and for the body of the county of

State v. Fulton.

St. Louis, now here in court, duly empaneled, sworn and charged, upon their oath present, that John Fulton and Alexander Williamson, late of St. Louis, in St. Louis county, on the first day of February, in the year of our Lord one thousand eight hundred and fifty-three, and on divers other days and times, between that day and the day of the finding of this indictment, at St. Louis, in St. Louis county aforesaid, unlawfully did set up and keep a certain table and gambling device, commonly called a faro bank, the same being then and on said other days and times there a gambling device, adapted, devised and designed for the purpose of playing a game of chance for money and property; and did then and on said other days and times there induce, entice and permit certain persons, to the jurors aforesaid unknown, to bet and play at and upon a game played at and by means of such gambling device, on the side and against the keeper thereof, against the peace and dignity of the state."

1. Is the indictment sufficient? If so, then the court below erred in quashing it.

The indictment is framed under the 15th section, article 8, of the act concerning crimes and punishments, (R. C. 1845, p. 401, 402.) This section is as follows: "Every person who shall set up or keep any table or gambling device, commonly called A. B. C., faro bank, E. O., roulette, equality or any kind of gambling table or gambling device, adapted, devised and designed for the purpose of playing any game of chance, for money or property, and shall induce, entice or permit any person to bet or play at or upon any such gaming table or gambling device, or at or upon any game played at or by means of such table or gambling device, or on the side or against the keeper thereof, shall, on conviction, be adjudged guilty of a misdemeanor, and punished by imprisonment in a county jail not exceeding one year, and by fine not exceeding one thousand dollars."

The indictment charges the offence here in the words of the statute. The defendants contend that the offence intended to

be prohibited is not setting up and keeping the gambling table or device, and the inducing, enticing and permitting persons to bet or play at or upon such table or gambling device, but it is necessary, in order to constitute an offence, that money or property should be bet, won or lost on such gambling device, at such betting or playing. The statute does not say so. The offence is complete under the words of this section, without any averment that property was won or lost or bet on such gambling table. It was not the losing of money or property that the legislature intended here to punish, but it was to prevent any person from keeping or setting up any gambling device or gaming table, adapted, devised and designed for the purpose of playing games of chance for money or property, and inducing, enticing or permitting persons to play at or bet on such table. The crime was in setting up or in keeping such a gambling device, and in permitting persons to bet or *play* at such table or gambling device. The legislature knew where the root of this evil was; they wished to prevent the opportunity to the incautious and over-credulous of becoming dupes and victims to sharpers and gamblers. They would punish, therefore, those persons who keep or set up such gaming devices, adapted and devised for playing games of chance for money or property, and who induce or entice or permit persons to bet thereon or play thereat.

Men never become gamblers at once; they play with and familiarize themselves to the use and sight of the implements of ruin, before they practice with and employ them to make money thereby—before they become, in their own estimation, skilful enough to use such implements with success.

The indictment is considered sufficient, and as that is the only point of importance in this case, worthy our consideration, the judgment below will be reversed, and the cause remanded, the other judges concurring.

State v. Smith.—State v. Baker.

THE STATE vs. SMITH.

RYLAND, Judge. This case is, in all respects, similar to the one of the *State v. Fulton & Williamson*, just decided. It was an indictment for keeping a faro bank, like that of *Fulton & W.*, and we refer to that opinion to settle and determine this. The judgment is reversed and the cause remanded.

THE STATE, Plaintiff in Error, vs. BAKER, Defendant in Error.

1. The supreme court will not, for any reason, disturb a judgment in a criminal case after a verdict of acquittal.

Error to Knox Circuit Court.

Indictment for selling spirituous liquors in less quantities than one quart without a license. The defendant admitted the sale, and then produced in evidence a receipt of the county collector for the *ad valorem* tax upon his stock of groceries for six months, covering the time when the offence charged in the indictment was alleged to have been committed. The court below instructed the jury that the payment of the *ad valorem* tax authorized the defendant to sell in the usual course of his business, in less quantities than one quart, without a license. There was a verdict of acquittal.

Clover submitted the case for the State.

No appearance for the defendant.

RYLAND, Judge, delivered the opinion of the court.

The defendant was indicted for selling spirituous liquors without license; he appeared and pleaded not guilty. A trial was had, and, under an instruction from the court, the jury found the defendant not guilty.

State v. Baker.

The circuit attorney objected to the instruction, and after verdict, moved to set the same aside, and grant a new trial for the erroneous and illegal instruction. The court overruled the motion, and the State brings the case here by writ of error.

The defendant having been found not guilty by a jury, this must end the matter. The verdict of acquittal is a protection against any further proceedings, and this court will not interfere in such cases. See the case of the *State v. Spear*, 6 Mo. Rep. 644. Let the judgment be affirmed, the other judges concurring.

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ASSUMPSIT.

See ATTORNEY AND COUNSEL, 1.

1. Where several parties interested in resisting a suit, appointed a committee of their number to employ counsel and conduct the defence, and agreed in writing to pay to the committee such *pro rata* assessments as might be made against them to defray the expenses of the defence, and one of the parties to the agreement failed to pay the amount assessed against him, which was thereupon made up by the committee, *it was held*, that each member of the committee might sue separately for the amount paid by him. *Finney v. Brant*, 42.
2. A suit brought by a member of the committee to recover back the amount paid by him, will not be defeated by the mere fact that it was actually paid by a firm to which he belonged, (he alone being a party to the agreement,) unless it appears that the money belonged to the firm, and was not paid on his account. *Ib.*
3. Several parties united in defending a suit which involved the title to a tract of land in which they were interested. They appointed a committee of their number to conduct the defence, and all agreed to pay such assessments as might be made upon them to defray expenses, in proportion to the value of their respective interests. *Held*, it was only necessary for the committee to make one valuation of the land, upon the basis of which calls might continue to be made until the end of the litigation, although the relative value of the several interests might have changed. *Lindell v. Brant*, 50.
4. No express contract being alleged, a party suing for services rendered can only recover what they are reasonably worth. *Crole v. Thomas*, 70.

ATTACHMENT.

1. The attachment law of 1845, and not the new code, governs as to the publication of notice to non-resident defendants in attachment suits. *Gates v. Clavadetscher*, 125.
2. Crops sown by a tenant, and afterwards abandoned by him, and harvested by the landlord after the expiration of the lease, are not liable to attachment as the property of the tenant, whether the latter would have had the right to enter upon the land and gather the crops or not. *Hall v. Shannon*, 401.
3. The court trying an issue made by an interplea in an attachment suit must find the facts, as required by the code. *Skinner v. Thompson*, 528.
4. In an action upon an attachment bond given under our statute, the plaintiff can only recover the natural and proximate damages resulting from the attachment. Damages for injuries to credit and business can only be recovered in an action on the case for *maliciously* suing out an attachment. *State, to use of Roe, v. Thomas*, 613.

ATTORNEY AND COUNSEL.

1. Upon an inquiry of damages after a judgment by default upon a *quantum meruit* or *assumpsit* count by an attorney for services rendered, evidence of a contract is not admissible, nor can it be shown, for the purpose of increasing the amount of the recovery, that by the contract, the fee depended upon a contingency. *Munford v. Wilson*, 669.

AUTHENTICATION.

See JUDGMENTS OF SISTER STATES, 2. WILL.

BANKING.

1. An indictment framed under the first and second sections of the act to prevent illegal banking, (R. C. 1845,) which charges the defendant with making or putting in circulation a note, bill, check or ticket purporting that money will be paid to the receiver or holder thereof, or that it will be received in payment of debts, can only be sustained by the production and giving in evidence of a note, bill, check or ticket, which, upon its own face, declares that money will be paid to the receiver or holder thereof, or that it will be received in payment of debts. (Scott, J., dissenting.) *State v. Page & Bacon*, 213.
2. The word "purporting," in the first section of the act, does not apply to the last clause of the section. This clause is violated whenever a party creates or puts in circulation notes, bills, checks or tickets "to be used as a currency or medium of trade in lieu of money," whatever may be their purport. *Ib.*

BILL OF EXCEPTIONS.

See PRACTICE, 51.

1. A case will not be reversed for the exclusion of evidence, unless an exception is taken at the trial. *Lee v. Lee*, 420.

BILL OF INTERPLEADER.

See EVIDENCE, 25.

1. Any trustee having reasonable doubt as to the proper disposition of funds in his hands has a right, for his own safety, to apply to a court of equity for directions, making the persons interested parties to the proceeding. *Hayden's Ex'rs v. Marmaduke*, 403.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See PROMISSORY NOTES. PLEADING, 42. SECURITIES, 2.

1. The endorser of a negotiable note is not a security, within the meaning of the act concerning "securities." (R. C. 1845.) *Clark v. Barrett*, 39.
2. A party to whom negotiable paper is transferred merely as collateral security for an antecedent debt, will hold it subject to all the equities existing between the original parties. *Goodman v. Simonds*, 106.
3. A. delivered to B. his acceptance, payable four months after its date,

BILLS OF EXCHANGE AND PROMISSORY NOTES—(Continued.)

for which a blank was left, with authority to negotiate the same. At the time of negotiating the bill, B. filled the blank with an anterior date. *Held*, the bill was void in the hands of the party receiving it, with knowledge that it was ante-dated. *Ib.*

4. If there is a discrepancy between the amount stated in the body of a certificate of deposit and that stated in the margin, the former will prevail, and if the certificate is declared upon as for the amount in the margin, it is no error to instruct that the plaintiff cannot recover, although the defendants in their answer acknowledge their indebtedness for the amount stated in the body. *Payne v. Clark & Bros.*, 152.

BOATS AND VESSELS.

1. A warrant against a boat issued in the name of one of the plaintiffs only. Upon a motion, filed after the seizure and sale of the boat, to quash the writ and all proceedings, *held*, that the writ might be amended and would be considered as amended. (*Jones v. Cox*, 7 Mo. Rep. 173, affirmed.) *Jarbee v. Steamboat Daniel Hillman*, 141.
2. A return to a writ against a boat which omits to state that the officer seized the boat is defective. *Blatsdell v. Steamboat Wm. Pope*, 157.
3. It is not too late to amend the return after motion filed to set aside the judgment. (*Maulsby v. Farr*, 3 Mo. Rep., overruled.) *Ib.*
4. The officer who executed the writ may amend his return, although when leave is given to amend, he has ceased to be the officer of the court. *Ib.*
5. It is not necessary for the officer to state in his return that he retains the boat in custody. *Ib.*
6. Where a suit is instituted against a boat, either before a justice or a court, it must appear from the demand filed that the same is a lien. *Luft v. Steamboat Envoy*, 476.
7. Under the act concerning boats and vessels, (R. C. 1845,) a boat is not subject to a lien, on account of supplies furnished without the limits of the state. (Former decisions affirmed.) *James v. Steamboat Pawnee*, 517.
8. A ship carpenter, who contracts to repair a boat and furnish materials, is not an agent, within the meaning of the act concerning boats and vessels, and cannot create a lien upon the boat in favor of a party from whom he purchases materials. *Childs v. Steamboat Brunette*, 518.
9. The affidavit to a complaint against a boat, under the act (R. C. 1845,) if made by the plaintiff's agent, must show the agent's means of knowledge. (*Bridgeford v. Steamboat Elk*, 6 Mo. Rep. 356, affirmed.) *Hamilton v. Steamboat Iron-ton*, 523.
10. A party does not waive his objection to a defective complaint by obtaining a continuance. *Ib.*
11. The admissions of the owner of a boat, made after the boat has been seized and ordered to be sold, are not competent to establish a demand presented for allowance as a lien upon the proceeds. *Renshaw v. Steamboat Pawnee*, 532.

BOATS AND VESSELS—(Continued.)

12. Where a boat is seized, and bond is given under the ninth section of the act concerning boats and vessels, (R. C. 1845,) the lien is discharged, and the party cannot, after the boat has been sold, present his demand for allowance against the proceeds. *Auray v. Steamboat Pawnee*, 537.
13. An officer seizing a boat has no authority to hold her without bond, subject to final process in the suit. It is his duty to apply for an order of sale, unless she is bonded within five days, under the ninth or tenth sections of the act concerning boats and vessels. (R. C. 1845.) *Blaisdell v. Steam Ferry Boat Wm. Pope*, 538.
14. The law commissioner's court has no authority to make an order for the sale of a boat, or to distribute the proceeds. *Ib.*
15. What is a proper precautionary measure in itself, uninfluenced by rule, usage or custom, to avoid collisions of steamboats, is a question of law. Signals by bells are not, as a matter of law, without regard to usage or custom, a proper measure of precaution. *Rogers v. McCune*, 557.
16. The declarations of the master of a boat, after a collision, as to how it occurred, are not admissible against the owner. *Ib.*
17. A witness may be allowed to state the nature of the fracture in a boat caused by a collision, and his impressions derived therefrom as to the position of the two boats when the collision occurred. *Patrick v. Steamboat J. Q. Adams*, 73.
18. A party who was an owner of the boat when attached, and when bond was given for her release, is not a competent witness for the boat, even though he may afterwards have sold his interest. *Ib.*
19. A witness testifying as to the general character of a pilot cannot state his knowledge of particular instances of recklessness. *Ib.*

BONDS AND NOTES.

See PROMISSORY NOTES. PLEADING, 19, 20. SPECIFIC PERFORMANCE, 1. SHERIFF, 1, 3. COSTS, 2.

1. Under the new practice, a party suing upon a bond must state his title in his petition. It is not sufficient to aver that he is the legal holder. *Smith & Kinzer v. Dean*, 63.
2. A note was payable to the order of "I. J. C., guardian," &c. Held, an endorsement by I. J. C. passed the title to a party who received for value and in good faith: the words "guardian," &c., being mere words of description. *Thornton v. Rankin*, 193.
3. A suit upon a sheriff's bond is properly brought in the name of the state. *State v. Moore*, 369.
4. In an action against the executor of an executor upon the latter's bond, it is necessary that the declaration should allege that neither the executor, in his life time, nor his executor since, have performed the act required by law or the order of the court. Such an allegation will not make the declaration bad for a misjoinder of actions. *State v. Petticrew's Executor*, 373.

BONDS AND NOTES—(Continued.)

5. The securities in a *rejected* bond for costs are discharged, upon the dismissal of the suit for the plaintiff's failure to file an approved bond. *Hollinsworth v. Matthews*, 406.

CHARTER.

See INSURANCE, 3, 4, 5. TAXES, 1, 2.

CIRCUIT ATTORNEY.

See FEES.

CITY ORDINANCE.

See PLEADING, 40. CONSTITUTION.

CLAIM AND DELIVERY OF PERSONAL PROPERTY.

1. A petition filed for the recovery of personal property was not verified by affidavit. The plaintiff swore to the petition before a justice, but the justice failed to annex his certificate. *Held*, the plaintiff might be permitted to verify the petition *nunc pro tunc*. *Bergesch v. Keevil*, 127.

COLLISION.

See BOATS AND VESSELS, 15, 16, 17, 18, 19.

COMPLAINT.

See FORCIBLE ENTRY AND DETAINER, 1. BOATS AND VESSELS, 6, 9, 10.

1. The statutory remedy for trespass on land does not supersede the common law remedy. So, a complaint before a justice, which would be insufficient under the statute, may yet be good for the common law action. *Tackett v. Huesman*, 525.

CONSPIRACY.

1. An action does not lie for a conspiracy to do a lawful act. Thus, an action will not lie against the officers of insurance companies for combining to refuse to take insurance on a boat, however malicious their motive. *Hunt v. Simonds*, 583.

CONFIRMATION.

See LANDS AND LAND TITLES, 2, 3, 4, 5, 6, 7, 8. SCHOOL LAND.

CONSTABLE.

See JUSTICES' COURTS, 4, 5. CONTRACTS, 6.

1. The summary proceeding against a constable and his securities, under the 23d and subsequent sections of the 7th article of the act concerning justices' courts. (R. C. 1845,) must be before the justice who issued the execution, in respect to which the delinquency arose, or before his successor in office. *Roach v. Settles & Hunter*, 397.

CONSTITUTION.

1. The quarantine ordinance of the city of St. Louis, approved January 14, 1852, is constitutional. (*City of St. Louis v. McCoy*, 18 Mo. Rep. 238, affirmed.) *City of St. Louis v. Boffinger*, 13.

CONTRACTS.

See PRACTICE, 19. MASTER AND SERVANT, 2. SPECIFIC PERFORMANCE, 1, 2. USURY. ATTORNEY AND COUNSEL, 1. ASSUMPSIT, 3, 4. INSURANCE, 1.

1. A servant employed by the year, at fixed wages, cannot recover any thing for his services, if he quits without cause before the expiration of the year. *Schnerr v. Lemp*, 40.
2. A. made a parol contract with J. T. for the delivery of a certain number of beef cattle, and, pursuant to the contract, deposited with G. money in part payment. The receipt given by G. stated that the money was deposited on a contract made with W. T. Held, it might be shown by parol evidence, for the purpose of taking the contract out of the statute of frauds, that the money was in reality deposited for J. T.; that this amounted to nothing more than proving a part payment by parol evidence. *Alexander v. Moore*, 143.
3. A contract will not be avoided by duress of imprisonment under legal process, unless there has been an improper use made of the process, either in wilfully employing it to imprison the defendant upon a demand that was groundless, or knowingly exaggerated, or unless there has been a subsequent abuse of the process, and an advantage gained thereby. *Holmes v. Hill*, 159.
4. Where a mother-in-law performs menial services in the family of her son-in-law, it is for the jury to determine from all the circumstances, whether it was under an implied contract for wages, or not. *Smith v. Myers*, 433.
5. A release of a parol contract before breach need not be under seal. Thus, where goods are consigned to two partners for sale, one of them, who retires from the firm before the goods are sold, and is verbally released, is not liable for goods subsequently sold by the remaining partner. *Robinson v. McFaul*, 549.
6. A note given to a constable for forbearance to levy an execution is void. *Ashby v. Dillon*, 619.
7. A plaintiff cannot recover compensation for merely voluntary services bestowed under no employment from the defendant. *Lynch v. Bogy*, 170.

CONTRIBUTION.

See WILL, 1. PLEADING, 2.

CONVEYANCE.

See SPECIFIC PERFORMANCE, 1. COVENANT.

1. *Youse v. Norcum*, 12 Mo. Rep. 549, affirmed. *Norcum v. Gaty* 65.
2. Where a minor *feme covert* joined with her husband in a deed conveying a lot belonging to her, it was held, that possession under the deed was adverse to any interest in the lot subsequently acquired by the wife, and adverse to any outstanding interests, and did not, as to such interests, enure to the benefit of the wife. *Ib.*

CONVEYANCE—(Continued.)

3. No principle of the Spanish law is known, making an after acquired title enure to the benefit of a former grantee. *Ib.*
4. The cancellation or destruction of a deed will not revest the title of the alienee in the alienor, although it may be done by mutual consent and with a view to that object. *Tibeau v. Tibeau*, 78.
5. A deed conveying "a tract of land eight arpens in front upon the depth of forty," with no proof of its locality, was held not sufficient to pass the specific land claimed by the plaintiff. *Vasquez v. Richardson*, 96.
6. A deed of bargain and sale, for a valuable consideration, in trust for the use of the wife of the bargainor during life, and her heirs in fee simple, raises a use in the bargainee, and the second use is not executed by the *statute of uses*, even though the consideration may have moved from her to whom it was limited. *Guest v. Farley*, 147.
7. A conveyance obtained without sufficient consideration from a man of weakened intellect by a person having influence with him, practising upon his passions, will be set aside. *Freeland v. Eldridge*, 325.
8. Under the revenue act of 1845 and the amendatory act of 1847, no title to land sold for taxes passes until a deed is executed by the register. The deed does not relate back to the sale. *Donohoe v. Veal*, 331.
9. The mere addition of the words "*and relinquishes her dower*," in the certificate of a married woman's acknowledgment, will not render it inoperative to pass her own estate. *Delassus v. Poston*, 425.
10. Where a deed describes the land conveyed by reference to a survey of a town, and only one survey is offered in evidence, the description in the deed must be taken, as a matter of law, to refer to that survey. *Mentins v. Blumenthal*, 496.
11. A plaintiff in ejectment cannot recover land not embraced by the description in the deed under which he claims, although his grantor, holding under a deed with a similar description, may have acquired title to it by possession or otherwise. *Ib.*

CORPORATIONS.

1. Under section 20 of article 1 of the act concerning corporations, (R. C. 1845,) the directors of an incorporated company are not liable to a stockholder for the excess of the indebtedness of the company contracted during their administration, over the amount of the capital stock paid in. *Kritzer v. Woodson*, 327.
2. They are not liable to any person, unless the indebtedness existing at one time exceeds the stock paid in. *Ib.*
3. A devise to a corporation will not be avoided by an immaterial variation in the name. *St. Louis Hospital Association v. Willams' Adm'r*, 609.

COSTS.

1. If a party appealing from a conviction before a justice for an assault and battery, fails to prosecute his appeal, the judgment is properly affirmed. *State v. Theventin*, 237.
2. The securities in a rejected bond for costs are discharged, upon the dis-

COSTS—(*Continued.*)

- missal of the suit for the plaintiff's failure to file an approved bond. *Hollinsworth v. Matthews*, 406.
3. *Martin v. White*, 11 Mo. Rep. 214, and *Starr v. Stewart*, 18 Mo. Rep. 410, affirmed. *Milligan v. Dunn*, 643.
 4. The supreme court will not interfere with the discretion exercised by inferior courts in taxing costs against a losing party. *Walton v. Walton*, 667.

COUNTIES.

1. Suit may be maintained in the name of a county upon a note payable to the county to the use of the state school fund. *Barry County v. McGlothlin*, 307.
2. The fourth and fifth sections of article three of the act concerning county treasuries, (R. C. 1845,) prescribing the form of county warrants, are merely directory. A departure from the form prescribed is no defence to an action on the warrant. *Young v. Camden County*, 309.

COUNTY COURT.

See ROADS AND HIGHWAYS.

COUNTY TREASURIES.

See COUNTIES.

COVENANT.

1. The rule which limits the recovery, in an action upon the covenant of seizin, to a nominal sum, until there has been an actual eviction, does not apply where the title conveyed has entirely failed, and the grantee holds by an adverse title. *Lawless v. Collier's Ex'rs*, 480.
2. Where the grantee has purchased in the adverse title, the measure of damages is the amount paid. *Ib.*
3. But where the grantee assigns the covenants in the deed of his grantor, as a part of the consideration paid for the adverse paramount title, the assignee is entitled to the full amount of the purchase money, in an action upon the covenant of seizin. *Ib.*
4. A reconveyance is not necessary to a recovery of the entire purchase money, where the title has entirely failed. *Ib.*
5. As, under our statute, the occupant of land is only liable to the real owner for the rents and profits for the five years next preceding the commencement of suit for the possession, he might, it seems, in an action against his grantor upon the covenant of seizin, only be entitled to recover interest upon the purchase money for the same period, where his occupation had been beneficial. *Ib.*

CRIMES AND PUNISHMENTS.

See SLAVE, 2. PRACTICE AND PROCEEDINGS IN CRIMINAL CASES. EVIDENCE, 7.

1. No appeal lies in favor of a slave convicted before a justice of the peace of petit larceny. *State v. Joe*, 223.

CRIMES AND PUNISHMENTS—(Continued.)

2. A party who sells a slave with a covenant of warranty of title, knowing that he has no title, is not guilty of such a false pretence as is indictable under the statute, (sec. 49, art. 3, act concerning crimes and punishments, R. C., 1845.) *State v. Chunn*, 233.
3. A verdict in a criminal case which incorrectly states the name of the party indicted, will not support a judgment. *State v. Mc Bride*, 239.
4. Such a mistake cannot be amended after the separation of the jury. *Ib.*
5. It is not a presumption of law that every one present at a riot, and not actually aiding in the suppression, is guilty, unless he proves his non-interference. *Ib.*
6. The bad character of the parents of the prosecutrix is not admissible evidence in behalf of a party charged with rape. *State v. Anderson*, 241.
7. At the trial of a negro upon an indictment for an attempt to ravish a white female, the jury is at liberty to find that the averments of the indictment as to color or race and sex are sustained, from seeing the parties in court, and proof that the defendant is a slave. *Ib.*
8. An indictment of a negro for an attempted rape is properly framed upon the first clause of the 31st section of the 2d article of the act concerning crimes and punishments, (R. C. 1845,) without reference to the 26th or 37th sections, which are only applicable to rapes and attempted rapes by white persons. *Ib.*
9. There can be no larceny without a felonious intent. *State v. Gresser*, 247.
10. A purse accidentally left in a store is not lost, and a party who takes it with a felonious intent is guilty of larceny. *State v. McCann*, 249.
11. A circuit attorney can make no agreement which will discharge a criminal from responsibility for an offence. *State v. Lopez*, 254.
12. A circuit attorney, in open court, agreed with a defendant, against whom several indictments were pending, that, if he would plead guilty as to some, he should be discharged from the others. The defendant accordingly pleaded guilty to four of the indictments, and a *nol. pros.*, in the ordinary form, was entered on the record as to the remainder. Held, the entry of a *nol. pros.* could not be held to have the legal effect of a *retraxit*, by reason of the agreement. *Ib.*
13. Cards are a gambling device within the meaning of the fifteenth section of the eighth article of the act concerning crimes and punishments. *State v. Herryford*, 377.

DAMAGES.

See INJUNCTION, 1. PRACTICE, 17, 44. See *Mooney v. Kennett*, p. 551.

1. Unliquidated damages not the subject of set-off. *Brake v. Corning*, 125.
2. A party may recover for damages caused by the negligence of another in performing a duty, unless his own negligence contributed to the loss. *Reeves v. Larkin*, 192.
3. Where a court, by its decree, rescinds a sale and conveyance of land, at

DAMAGES—(Continued.)

the instance of the vendee, a mortgage given for the purchase money is rescinded, as a necessary consequence; and it is error in the decree to award a special execution against the mortgaged property, to satisfy damages allowed to the vendor for the vendee's use of the land. *Coffman v. Huck*, 435.

4. Where there is no bad faith, a vendor cannot be made liable for improvements put by the vendee on land, the title to which fails. The measure of damages is the purchase money and interest. *Ib.*
5. A party who enters upon land as a vendee, cannot, upon a subsequent rescision of the contract of sale, be made liable for the rent of the land as a tenant. He is only liable to the extent of the benefit actually derived by him from the use of the land, in ascertaining which, he may be allowed for all outlays in improvements, including those put upon a portion of the land represented, by mistake, to have been embraced in the conveyance to him, but which, in reality, was not. *Ib.*
6. In an action for the conversion of a slave, the measure of damages is the value with interest. The plaintiff cannot recover the value of the hire by way of damages. *Polk's Adm'r v. Allen*, 467.
7. The rule which limits the recovery, in an action upon the covenant of seizin, to a nominal sum, until there has been an eviction, does not apply where the title conveyed has entirely failed, and the grantee holds by an adverse title. *Lawless v. Collier's Ex'rs*, 480.
8. Where the grantee has purchased in the adverse title, the measure of damages is the amount paid. *Ib.*
9. But where the grantee assigns the covenants in the deed of his grantor, as a part of the consideration paid for the adverse paramount title, the assignee is entitled to the full amount of the purchase money, in an action upon the covenant of seizin. *Ib.*
10. A reconveyance is not necessary to a recovery of the entire purchase money, where the title has entirely failed. *Ib.*
11. As, under our statute, the occupant of land is only liable to the real owner for the rents and profits for the five years next preceding the commencement of suit for the possession, he might, it seems, in an action against his grantor upon the covenant of seizin, only be entitled to recover interest upon the purchase money for the same period, where his occupation had been beneficial. *Ib.*
12. Words which involve a charge of adultery are actionable by statute, without alleging special damage. *Stieber v. Wensel*, 513.
13. In an action upon an attachment bond given under our statute, the plaintiff can only recover the natural and proximate damages resulting from the attachment. Damages for injuries to credit and business can only be recovered in an action on the case for maliciously suing out an attachment. *State, to use of Roe, v. Thomas*, 613.

DEED.

See CONVEYANCE.

DELIVERY.

See **FRAUDS AND PERJURIES**, 5.

DEMAND AND NOTICE.

1. No demand before suit is necessary where the defendant is wrongfully in possession. *McCarty and wife v. Rountree*, 345.
2. If a slave is gratuitously left with a party, no damages are recoverable until a demand. *Polk's Adm'r v. Allen*, 467.

DEPOSITION.

1. An uncertified deposition may be read in evidence, after the death of the witness, upon the testimony of the officer that the deposition was regularly taken. *Wood v. Steamboat Fleetwood*, 529.
2. The statement of a witness in his deposition that he is "going to leave the state for Europe to-morrow," will not authorize the reading of his deposition in evidence at the trial, two months afterwards, without some proof of his absence. *Gaul v. Wenger*, 541.

DESCENTS AND DISTRIBUTIONS.

1. The personal estate of an intestate does not upon his death descend immediately to those entitled to distribution, but where there is administration on the estate, the right to the possession is in the administrator. *Gillet v. Camp*, 404.

DETINUE.

See **CLAIM AND DELIVERY OF PERSONAL PROPERTY**.

DEVISE.

See **WILLS. USES AND TRUSTS**, 7. **CORPORATIONS**, 3.

DIVORCE.

1. A finding of the facts which merely states that the defendant was guilty of acts and abuse which were indignities, without stating the nature of the acts or abuse, is not sufficient to support a decree for a divorce. *Bowers v. Bowers*, 351.
2. A petition for a divorce which only charges, in general terms, that one party offered to the other indignities which rendered his or her condition intolerable, is not sufficiently specific under the statute. *Ib.*
3. A petition for a divorce on the ground of the absence of the defendant for more than two years, must allege that the absence was without reasonable cause. *Freeland v. Freeland*, 354.
4. Under the act of March 12, 1849, amendatory of the act of 1845, concerning divorces, it is not necessary that indignities, to be the ground of a divorce, should be offered to the person. *Hooper v. Hooper*, 355.
5. Under the act of March 12, 1849, amendatory of the act of 1845, the writing of a letter by a husband to his wife, declaring his determination never again to live with her, assigning no other reason than that she did not suit him, that he had been deceived in her, and that she had been guilty of improper conduct towards his relatives, is not an indignity which is a ground for a divorce. *Ib.*

DIVORCE—(*Continued.*)

6. Nor is the posting up of a notice by the husband, notifying all persons not to credit the wife, any ground for a divorce. *Ib.*
7. Abandonment without cause and refusal to provide for and support a wife is good ground for a decree for maintenance, under the ninth section of the act of 1845. *Ib.*

DOWER.

1. A bequest of a slave to a widow does not, under the tenth section of the act concerning dower, bar her dower in real estate. *Halbert v. Halbert*, 453.
2. Under the 13th section of the act concerning dower (R. C. 1845) a settlement, whether ante-nuptial or post-nuptial, to be a bar to dower, must be expressed on its face to be in discharge of dower. *Perry v. Perryman*, 469.
3. A. before his marriage, conveyed certain land to B., in fee, in trust to such use or uses, and to such person as A., in his life-time, should, by deed or will appoint, and in default of and until such appointment, to the use of A. and his heirs in fee. A., by his last will, devised all his real estate to his children by a former marriage. *Held*, A.'s widow was entitled to dower in the land first named, his will being regarded as a devise of his interest, and not as an execution of the power of appointment. *Link v. Edmondson*, 487.
4. Under the act of 1825, a widow's dower was barred by an administration sale to pay her husband's debts. *Mount v. Valle*, 621.

DURESS.

See CONTRACT, 3.

EJECTMENT.

1. Where the plaintiff in an ejectment suit dies, the suit may be revived in the name of his heirs or devisees. *Fine v. Gray*, 33.
2. Law and equity being now blended, an equitable title arising out of a contract for the sale of land is a defence to an action instituted to recover possession of the land. *Tibeau v. Tibeau*, 78.
3. Possession of land under a contract of sale, and payment of the purchase money, is a good defence to an action brought by the alienor for the possession. *Ib.*
4. A wife residing with her husband upon the property of another cannot, under ordinary circumstances, be joined as a defendant, in an action of ejectment. *Meegan v. Gunsollis*, 417.
5. A plaintiff in ejectment cannot recover land not embraced by the description in the deed under which he claims, although his grantor, holding under a deed with a similar description, may have acquired title to it by possession or otherwise. *Menkins v. Blumenthal*, 496.
6. Twenty years' adverse possession before ouster will sustain an action of ejectment. *Joyal v. Rippey*, 660.

ELECTION.

See JUDGMENT, 3. PLEADING, 38.

1. P. by deed of gift, conveyed the eastern half of a lot of ground to his daughter, E. Afterwards, by his last will, he devised the western half to his daughter, T. P. really owned but an undivided half of the lot. The other undivided half belonged to his children in right of their deceased mother, by virtue of the provisions of a marriage contract. E. did many acts recognizing the validity of the will, such as conveying away property devised to her, &c. T. instituted a proceeding in the nature of a bill *quia timet*, to be quieted in her title to the portion of the lot devised to her. *Held*, such a proceeding could not be maintained, under the circumstances. *Taylor v. Ulrick*, 89.

EMBLEMENTS.

1. Crops sown by a tenant, and afterwards abandoned by him, and harvested by the landlord after the expiration of the lease, are not liable to attachment as the property of the tenant, whether the latter would have had the right to enter upon the land and gather the crops or not. *Hall v. Shannon*, 401.

ENTRY.

See PUBLIC LANDS, 1.

ENUREMENT.

1. No principle of the Spanish law is known, making an after acquired title enure to the benefit of a former grantee. *Norcum v. Gaty*, 65.

ESTOPPEL.

1. If A. leaves his personal property in the possession of B., and with knowledge that he is holding himself out to the world as the owner of it, stands by and permits this conduct, he will be estopped from afterwards claiming the property as his own, against parties who have trusted B. upon the faith of it; nor is it necessary that A. should have known that B. designed to commit a fraud upon his creditors. *McDermott v. Barnum & Moreland*, 204.

EVIDENCE.

See PRACTICE, 12, 50. FRAUDS AND PERJURIES, 7. SUPREME COURT, 11. JUDGMENTS OF SISTER STATES, 2. DEPOSITION. SURVEY, 1. ATTORNEY AND COUNSEL, 1. PLEADING, 1, 21.

1. A party who executed a note for the defendant *was held* a competent witness for the defendant, to show that he had no authority. *St. John's Adm'r v. McConnell*, 38.
2. A witness may be allowed to state the nature of the fracture in a boat caused by a collision, and his impressions derived therefrom as to the position of the two boats when the collision occurred. *Patriek v. Steamboat J. Q. Adams*, 73.
3. A party who was an owner of the boat when attached, and when bond

EVIDENCE—(Continued.)

- was given for her release, is not a competent witness for the boat, even though he may afterwards have sold his interest. *Ib.*
4. A witness testifying as to the general character of a pilot cannot state his knowledge of particular instances of recklessness. *Ib.*
 5. Certified transcripts from justices of the peace are evidence, without proof of the justice's signature. *McDermott v. Barnum & Moreland*, 204.
 6. A case will not be reversed because irrelevant evidence was allowed to go to the jury, unless it could have misled or prejudiced them. *Ib.*
 7. On the trial of A., who had been jointly indicted with B. for grand larceny, an intercepted letter addressed by A. to a person whom he called C., warning him to make his escape, was held admissible against A., without any proof identifying C. with B., there being other independent evidence that A. and B. committed the larceny. *State v. Barton*, 227.
 8. The bad character of the parents of the prosecutrix is not admissible evidence in behalf of a party charged with rape. *State v. Anderson*, 241.
 9. Neither a civil nor a criminal case will be reversed merely because the verdict was against the weight of evidence. *Ib.*
 10. Jurors are the exclusive judges of the weight of testimony. They are not obliged to reject all the testimony of a witness who has testified falsely in one particular. *Ib.*
 11. One defendant is not a competent witness for his co-defendant. *Rice v. Morton*, 263.
 12. A. sold B. a horse, and a price was agreed on, which B. was to pay partly in goods which were delivered and partly in a debt due from C. to B. which B. was to transfer to A. Upon the failure of B. to transfer the debt, A. sued him for the balance of the price agreed upon. Held, B. might show that the horse was worth less than the price originally agreed upon. *Coy v. DeWitt*, 322.
 13. Declarations which would otherwise be inadmissible in evidence may become so when they are part of a transaction, evidence of which is admissible. *Crowther v. Gibson*, 365.
 14. On the trial of a party indicted for selling liquor in less quantity than one quart without a license, evidence that he had sold at a time different from that charged in the indictment was held inadmissible for any purpose. *State v. Fierline*, 380.
 15. A case in which the declarations of a testator were held inadmissible to explain the meaning of his will. *Gregory v. Cowgill*, 415.
 16. The contents of an instrument which is shown to be beyond the jurisdiction of the court may be proved by parol evidence. *Brown v. Wood*, 475.
 17. A party cannot introduce evidence for the sole purpose of discrediting his own witness; but when he calls a witness to establish a fact, who disappoints him, he may prove the same fact by another witness, although in so doing, he may discredit the first witness. *Ib.*

EVIDENCE—(Continued.)

18. Under the code, one partner is a competent witness for his co-partner, who is sued upon a demand against the firm. *Weston & Russell v. Hunt*, 505.
19. An uncertified deposition may be read in evidence, after the death of the witness, upon the testimony of the officer that the deposition was regularly taken. *Wood v. Steamboat Fleetwood*, 529.
20. The admissions of the owner of a boat, made after the boat has been seized and ordered to be sold, are not competent to establish a demand presented for allowance as a lien upon the proceeds. *Renshaw v. Steamboat Pawnee*, 532.
21. One partner who confesses an action is, under the code, a competent witness against his co-partner who defends it. *Robinson v. McFaul*, 549.
22. The declarations of the master of a boat, after a collision, as to how it occurred, are not admissible against the owner. *Rogers v. McCune*, 557.
23. The supreme court will not reverse a cause because a leading question was permitted to be asked a witness. *Ib.*
24. Where a record is proper evidence of a fact, it will be admitted, and the opposite party is left to his motion, to exclude irrelevant matter in the record from the consideration of the jury. *Soulard v. Clark*, 570.
25. On the hearing of a bill of interpleader, each party is at liberty to show the foundation of his claim, although it may not be evidence against other claimants. *Bennett v. Robinson*, 654.
26. It is settled that a certificate by recorder Hunt, under the act of 1824, is *prima facie* evidence of a confirmation by the act of 1812, and that an official survey is *prima facie* evidence of the true location of the land confirmed. *Joyal v. Rippey*, 660.

EXCEPTIONS.

See BILL OF EXCEPTIONS.

EXECUTION.

See GARNISHMENT. JUSTICES' COURTS, 4. CONTRACT 6. SHERIFF.

1. Under the act of 1847, amendatory of the act of 1845, concerning executions, and before the passage of the act of 1853, debts and wages to the amount of one hundred and fifty dollars due to a defendant who had no other property, were not exempt from garnishment on execution. *Gregory v. Evans*, 261.
2. An execution has never been allowed against the estate of a decedent in this state since May, 1, 1827. *Miller v. Doan*, 650.

EXECUTOR *de son tort*.

See ADMINISTRATION, 4, 5.

EXECUTORS AND ADMINISTRATORS.

See ADMINISTRATION. WILL, 1.

EXTINGUISHMENT.

See PRINCIPAL AND SURETY, 2, 3, 4. PAYMENT, 2. JUDGMENT, 6.

FACTOR.

See GARNISHMENT, 5.

FEES.

1. A circuit attorney is only entitled to one fee for a conviction upon one indictment, although it may contain more than one count. *Ex parte Craig*, 337.
2. Under the act of 1847, a garnishee is not entitled to an allowance for the fees of an attorney, but only for his own time and trouble in answering. *Stewart v. Anderson*, 478.

FORCIBLE ENTRY AND DETAINER.

1. Under the act (R. C. 1845) a complaint for an unlawful detainer, which states that the plaintiff is entitled to the immediate possession of the premises, and that the defendant unlawfully detains the same, is insufficient. *Andrae v. Heinritz*, 310.

FORECLOSURE.

See MORTGAGE, 3.

FOREIGN JUDGMENTS AND LAWS.

See INDICTMENT, 16. JUDGMENTS OF SISTER STATES.

1. If a party in our courts relies upon an Illinois statute of frauds, the burden is upon him of showing the existence of such a statute. *Houghtaling v. Ball & Chapin*, 84.

FRAUDS AND PERJURIES.

See PLEADING, 6. ESTOPPEL, 1. ASSIGNMENT, 1, 6.

1. A party who purchases goods on credit, knowing at the time his insolvency and inability to pay for them, but without a preconceived design not to pay, is not guilty of such a fraud as will avoid the sale. *Bidault v. Wales*, 36.
2. Possession of land under a contract of sale and payment of the purchase money is a good defence to an action brought by the vendor for the possession. *Tibeau v. Tibeau*, 78.
3. The fact that wheat contracted to be sold and delivered in Illinois is to be paid for on its arrival in Missouri, will not subject the contract to the operation of our statute of frauds. *Houghtaling v. Ball & Chapin*, 84.
4. If a party in our courts relies upon an Illinois statute of frauds, the burden is upon him of showing the existence of such a statute. *Ib.*
5. Whether there has been a delivery or not, so as to take a case out of the statute of frauds, is a question of fact to be passed upon by a jury under the direction of the court. *Ib.*
6. Fraud in an administration sale will not be presumed from the mere fact that the purchaser afterwards conveyed the property to the administrator. *Vasquez v. Richardson*, 96.
7. A. made a parol contract with J. T. for the delivery of a certain number of beef cattle, and, pursuant to the contract, deposited with G. money

FRAUDS AND PERJURIES—(Continued.)

- in part payment. The receipt given by G. stated that the money was deposited on a contract made with *W. T. Held*, it might be shown by parol evidence, for the purpose of taking the contract out of the statute of frauds, that the money was in reality deposited for J. T.; that this amounted to nothing more than proving a part payment by parol evidence. *Alexander v. Moore*, 143.
8. A conveyance obtained without sufficient consideration from a man of weakened intellect by a person having influence with him, practising upon his passions, will be set aside. *Freeland v. Eldridge*, 325.
 9. A debtor who employs another to buy in his property, at a sheriff's sale, with no other view than to prevent a sacrifice of it, is not guilty of a fraud. *Lee v. Lee*, 420.
 10. A parol lease, for a term of years, though by the statute of frauds declared to create a tenancy at will, has the effect of creating a tenancy from year to year, such being the established construction. *Kerr v. Clark*, 132.

FRAUDULENT CONVEYANCES.

1. Indebtedness at the time of a post-nuptial settlement is evidence of fraud, although there is a diversity of opinion as to the extent of indebtedness necessary to invalidate such a settlement. *Woodson v. Pool*, 340.
2. A conveyance for the benefit of a wife, in consideration of dower previously relinquished by her, is voluntary as to existing creditors. *Ib.*
3. A parol gift of a slave by a husband to his wife does not change the title. *Ib.*
4. A party in possession of personal property under a purchase from a mortgagee is not rendered liable to garnishment on execution, as a debtor of the mortgagor, by the fact that the mortgage was not acknowledged and recorded, nor followed by the possession of the mortgagee, as required by the 8th section of the act concerning fraudulent conveyances, (R. C. 1845,) there being no fraud in fact. *Bennett v. Robinson*, 654.

GAMING.

See PLEADING 4. INDICTMENT, 16, 20.

1. Cards are a gambling device within the meaning of the fifteenth section of the eighth article of the act concerning crimes and punishments. *State v. Herryford*, 377.

GARNISHMENT.

See ASSIGNMENT, 4.

1. The validity of a specific assignment of a debt may be tried in an issue between the plaintiff in an execution against the assignor, and the debtor summoned as garnishee of the assignor. *Doggett v. St. Louis Martne and Fire Insurance Co.*, 201.
2. A justice may render judgment against a garnishee for an amount

GARNISHMENT—(Continued.)

- within his jurisdiction, although the indebtedness of the garnishee to the defendant exceeds the jurisdiction of the justice. *Ib.*
3. Under the act of 1847, amendatory of the act of 1845, concerning executions, and before the passage of the act of 1853, debts and wages to the amount of one hundred and fifty dollars due to a defendant who had no other property, were not exempt from garnishment on execution. *Gregory v. Evans*, 261.
 4. Under the act of 1847, a garnishee is not entitled to an allowance for the fees of an attorney, but only for his own time and trouble in answering. *Stewart v. Anderson*, 478.
 5. A factor having in his possession goods consigned to him for sale, is not liable to be garnished on execution as a debtor of the owner. *Pratte & Dickson v. Scott & Otis*, 625.
 6. A party in possession of personal property under a purchase from a mortgagee is not rendered liable to garnishment on execution as a debtor of the mortgagor by the fact that the mortgage was not acknowledged and recorded, nor followed by the possession of the mortgagee, as required by the 8th section of the act concerning fraudulent conveyances, (R. C. 1845,) there being no fraud in fact. Whether the purchase was from the mortgagor or mortgagee, is a question of fact for the jury. *Bennett v. Wolcott & Robinson*, 654.

GIFT.

1. A parol gift of a slave by a husband to his wife does not change the title. *Woodson v. Pool*, 340.
2. A gift or bequest of a chattel to husband and wife vests the entire property in the husband. *Polk's Adm'r v. Allen*, 467.

GROCERIES AND DRAM SHOPS.

1. On the trial of a party indicted for selling liquor in less quantity than one quart without a license, evidence that he had sold at a time different from that charged in the indictment was held inadmissible for any purpose. *State v. Fierline*, 380.
2. No person can sell liquor to be drank at the place of sale, without a license. *State v. Williamson*, 384.
3. A physician, who administers intoxicating liquor in good faith as a medicine, upon his professional judgment, is not within the meaning of the first section of the act concerning groceries and dram shops. (R. C. 1845.) *State v. Larrimore*, 391.

GUARDIAN AND WARD.

See **BONDS AND NOTES**, 2.

1. Under our statute, the parent, as natural guardian, has no power to dispose of the property of the minor child not derived from such parent, before giving bond with security. *McCarty and wife v. Rountree*, 345.

HUSBAND AND WIFE.

See **DIVORCE**. **CONVEYANCE**, 9. **MARRIAGE CONTRACTS**, 1. **DOWER**.

HUSBAND AND WIFE—(Continued.)

1. Indebtedness at the time of a post-nuptial settlement is evidence of fraud, although there is a diversity of opinion as to the extent of indebtedness necessary to invalidate such a settlement. *Woodson v. Pool*, 340.
2. A conveyance for the benefit of a wife, in consideration of dower previously relinquished by her, is voluntary as to existing creditors. *Ib.*
3. A parol gift of a slave by a husband to his wife does not change the title. *Ib.*
4. The distributive share of a wife in an estate, not reduced into possession during the marriage, does not belong to the husband after her death. (*Leaky's Adm'r v. Maupin*, 10 Mo. Rep. 372, affirmed.) *Gillet v. Camp*, 404.
5. A wife residing with her husband upon the property of another cannot, under ordinary circumstances, be joined as a defendant, in an action of ejectment. *Meegan v. Gunsollis*, 417.
6. Husband and wife cannot release to each other their respective interests in land by deed of partition. *Fritsell v. Rozier*, 448.
7. A bequest of a slave to a widow does not, under the tenth section of the act concerning dower, bar her dower in real estate. *Halbert v. Halbert*, 453.
8. Under a marriage contract which reserved to the wife the ownership of her personal property, free from liability for the debts of her husband, with power to dispose of the same by will or otherwise, during the marriage, it was held that the wife retained an absolute estate. *Logan's Adm'rs v. Logan's Ex'rs*, 465.
9. A gift or bequest of a chattel to husband and wife vests the entire property in the husband. *Polk's Adm'r v. Allen*, 467.

INDICTMENT.

See PRACTICE AND PROCEEDINGS IN CRIMINAL CASES, 2. SLAVE, 2. STRAYS. CRIMES AND PUNISHMENTS.

1. An indictment against A. for inciting B. to a murder, by mistake charged that he incited A. Held, fatal. *State v. Houston*, 211.
2. An indictment for an assault with intent to kill must aver that the assault was with a deadly weapon. *State v. Jordan*, 212.
3. An indictment framed under the first and second sections of the act to prevent illegal banking, (R. C. 1845,) which charges the defendant with making or putting in circulation a note, bill, check or ticket purporting that money will be paid to the receiver or holder thereof, or that it will be received in payment of debts, can only be sustained by the production and giving in evidence of a note, bill, check or ticket, which, upon its own face, declares that money will be paid to the receiver or holder thereof, or that it will be received in payment of debts. (Scott, J., dissenting.) *State v. Page & Bacon*, 213.
4. The word "purporting," in the first section of the act, does not apply to the last clause of the section. This clause is violated whenever a

INDICTMENT—(Continued.)

- party creates or puts in circulation notes, bills, checks or tickets "to be used as a currency or medium of trade in lieu of money," whatever may be their purport. *Ib.*
5. It will not vitiate an indictment for petit larceny, to charge that the larceny was *feloniously* committed. *State v. Joiner*, 224.
 6. An indictment which charges that money was obtained by *color* of a false pretence, is not sufficient. The word "color" in the statute only applies to the words "false token or writing," and not to the clause immediately following. *State v. Chunn*, 233.
 7. A verdict in a criminal case which incorrectly states the name of the party indicted will not support a judgment. *State v. McBride*, 239.
 8. At the trial of a negro upon an indictment for an attempt to ravish a white female, the jury is at liberty to find that the averments of the indictment as to color or race and sex are sustained, from seeing the parties in court, and proof that the defendant is a slave. *State v. Anderson*, 241.
 9. An indictment of a negro for an attempted rape is properly framed upon the first clause of the 31st section of the second article of the act concerning crimes and punishments, (R. C. 1845,) without reference to the 26th or 37th sections, which are only applicable to rapes and attempted rapes by *white persons*. *Ib.*
 10. An indictment which does not conclude "against the peace and dignity of the state" is bad. *State v. Lopez*, 254.
 11. The supreme court will not reverse a judgment in a criminal case for error committed by the inferior court in quashing *one* count of an indictment, where the record shows that the defendant has been tried and acquitted on the remaining count or counts. *State v. Leapfoot*, 375.
 12. An indictment of a white person for being present at an unlawful meeting of slaves, must state the facts which constitute the meeting unlawful. *State v. Soot*, 379.
 13. On the trial of a party indicted for selling liquor in less quantity than one quart, without a license, evidence that he had sold at a time different from that charged in the indictment was held inadmissible for any purpose. *State v. Fierline*, 380.
 14. After the defendant was convicted for unlawfully killing a stray which he had taken up, the judgment was held properly arrested, because the indictment did not sufficiently state that the defendant did the killing. *State v. Derosselt*, 383.
 15. An indictment commenced thus: "State of Missouri, county of Hickory. The grand jurors for the state of —, empaneled, charged and sworn," &c. *Held*, sufficient. *State v. England*, 386.
 16. An indictment which charges the defendant with permitting a "gambling device" instead of a "gaming device" is sufficient. *State v. Nelson*, 393.
 17. The omission of the word "did" in an indictment for a misdemeanor,

INDICTMENT—(Continued.)

before the words "assault, beat and maltreat," held not fatal, and the addition of the words "with intent," held mere surplusage. *State v. Edwards*, 674.

18. *Jennings v. State*, 9 Mo. Rep, 862, affirmed. *State v. Magrath*, 678.
19. Time is not material in an indictment under the 38th section of article two of the act concerning crimes and punishments, so that the offence is alleged and proved to have been committed before the finding of the indictment, and within one year before. *Ib.*
20. In an indictment under the 15th section of article eight of the act concerning crimes and punishments, (R. C. 1845,) for enticing and permitting persons to play upon a gambling device, kept by the defendants, it is not necessary to allege that money or property was bet, won or lost. An indictment which follows the language of the statute is sufficient. *State v. Fulton & Williamson*, 680.

INFANT.

1. *Youse v. Norcum*, 12 Mo. Rep. 549, affirmed. *Norcum v. Gaty*, 65.
2. Where a minor *feme covert* joined with her husband in a deed conveying a lot belonging to her, it was held, that possession under the deed was adverse to any interest in the lot subsequently acquired by the wife, and adverse to any outstanding interests, and did not, as to such interests, enure to the benefit of the wife. *Ib.*
3. Where an infant, who is joined with other defendants, appears by attorney, a judgment against all the defendants will be reversed as to all. *Rush v. Rush*, 441.

INJUNCTION.

1. The mere fact that one proprietor, in building a house, inserts his joists in the wall of an adjoining proprietor, without license, will not authorize the interference of a court by injunction to remove the joists, although it is sufficient to entitle the party whose wall is thus used to recover damages. To obtain an injunction, he must show some special facts which entitle him to this extraordinary remedy. *Rankin v. Charles*, 490.

INSTRUCTIONS.

See PRACTICE, 13, 23, 27, 31, 40, 48, 50. SUPREME COURT, 14, 15.

INSURANCE.

1. The mere fact of the insolvency of an insurance company, when an insurance is effected, does not avoid the contract, nor exempt the assured from his liability to pay the premium, in the absence of any fraud. *Clark v. Middleton & Riley*, 53.
2. The failure of the agency of a foreign insurance company to file the statement required by the act to license and regulate such agencies, does not avoid promises made to the company to pay the premium on insurance. *Ib.*

INSURANCE—(Continued.)

3. Under the charter of the St. Louis Mutual Fire and Marine Insurance company, assessments may be made after the expiration of a policy for losses incurred during its continuance. *St. Louis Mutual Fire and Marine Insurance Co. v. Boeckler*, 135.
4. The company, under its charter, is entitled to retain a premium note until all losses liable to be assessed against it are paid. *Ib.*
5. Under that charter, if a member fails to pay an assessment within thirty days after publication of notice, the company may recover the whole amount of the premium note. *Ib.*
6. A life policy contained a condition, by which it was avoided if the assured should die in the known violation of a law of the state. *Held* that, under this clause, the policy would not be avoided, if the assured was killed after retreating from an altercation which he had commenced, under circumstances which would make the slayer guilty of felonious homicide. *Harper's Adm'r v. Phoenix Insurance Co.*, 506.
7. An action will not lie against the officers of insurance companies for combining to refuse to take insurance, however malicious their motives. *Hunt v. Stmonds*, 583.
8. *Loehner v. Home Mutual Insurance Company*, 17 Mo. Rep. 247, affirmed. 628.

INTEREST.

See USURY.

INTERPLEADER (BILL OF.)

See BILL OF INTERPLEADER.

INTERPLEADER (IN ATTACHMENT.)

1. The court trying an issue made by an interplea in an attachment suit must find the facts, as required by the code. *Skinner v. Thompson*, 528.

JOINTURE.

1. Under the 13th section of the act concerning dower, (R. C. 1845,) a settlement, whether ante-nuptial or post-nuptial, to be a bar to dower, must be expressed on its face to be in discharge of dower. *Perry v. Perryman*, 469.

JUDGMENT.

See JUDICIAL SALE, 1. PLEADING, 29. APPEAL, 6, 7.

1. The relation of principal and surety or of co-securities is not extinguished by judgment. Thus, where A. recovered against B. & C. as securities in a note, a judgment which was afterwards assigned to D., who directed the sheriff to return an execution issued thereon unsatisfied, when one half of the judgment debt might otherwise have been made out of the property of B., *it was held*, that C. was discharged to the extent of one half of the debt. *Rice v. Morton*, 263.
2. A judgment of a sister state, which appears to have been rendered by

JUDGMENT—(Continued.)

- the court upon a confession before the clerk in vacation, is conclusive. *Harness v. Green's Adm'r*, 323.
3. Several parties engaged in an assault and battery, may be sued jointly or separately; but if separate suits are brought, the plaintiff will be put to his election between the judgments, as there can be but one satisfaction. *Page v. Freeman*, 421.
 4. In a proceeding to set aside a will, it is erroneous to arrest a judgment as to some of the defendants, and enter a final judgment against the others. *Rush v. Rush*, 441.
 5. Where an infant, who is joined with other defendants, appears by attorney, a judgment against all will be reversed as to all. *Ib.*
 6. Prior to the taking effect of the Revised Code of 1845, the lien of a judgment was extinguished by the death of the judgment debtor. *Miller v. Doan*, 650.
 7. Where property was conveyed to A., with a clause of defeasance if the grantor should, within five years, pay a debt due from him to B., and A., treating the conveyance as a mortgage, obtained judgment of foreclosure upon the *cognovit* of the grantor in a suit to which B. was not a party, it was held that the title of the purchaser at a sale under the judgment could not be disputed in a collateral proceeding. *Miles v. Davis & Taylor*, 408.

JUDGMENTS OF SISTER STATES.

1. A judgment of a sister state, which appears to have been rendered by the court upon a confession before the clerk in vacation, is conclusive. *Harness v. Green's Adm'r*, 495.
2. Where a defendant, who is sued upon a foreign judgment, does not deny the judgment in his answer, but relies solely upon a set-off, he cannot object to the admission of the transcript in evidence, on the ground that it is not properly authenticated. *McLean v. Boyle*, 495.

JUDICIAL SALE.

See ADMINISTRATION, 2, 3.

1. Where property was conveyed to A., with a clause of defeasance if the grantor should, within five years, pay a debt due from him to B., and A., treating the conveyance as a mortgage, obtained judgment of foreclosure upon the *cognovit* of the grantor in a suit to which B. was not a party, it was held, that the title of the purchaser at a sale under the judgment could not be disputed in a collateral proceeding. *Miles v. Davis & Taylor*, 408.

JURISDICTION.

See JUSTICES' COURTS, 1. MORTGAGE, 3.

JUSTICES' COURTS.

1. A justice may render judgment against a garnishee for an amount within his jurisdiction, although the indebtedness of the garnishee to the defend-

JUSTICES' COURTS—(Continued.)

- ant exceeds the jurisdiction of the justice. *Doggett v. St. Louis Marine and Fire Insurance Co.*, 201.
2. No appeal lies in favor of a slave convicted before a justice of the peace of petit larceny. *State v. Joe*, 223.
 3. If a party appealing from a conviction before a justice for an assault and battery, fails to prosecute his appeal, the judgment is properly affirmed. *State v. Theventn*, 237.
 4. In an action against a constable, commenced before a justice, for a false return of an execution, the supreme court refused to disturb a nonsuit taken in the circuit court, it appearing that the execution issued upon an irregular judgment which might have been set aside, and that judgment against the constable was taken before the justice on the return day of the execution without any notice. *Dickerson v. Apperson*, 319.
 5. The summary proceeding against a constable and his securities, under the 23d and subsequent sections of the 7th article of the act concerning justices' courts, (R. C. 1845,) must be before the justice who issued the execution, in respect to which the delinquency arose, or before his successor in office. *Roach v. Settles & Hunter*, 397.
 6. Where a suit is instituted against a boat, either before a justice or a court, it must appear from the demand filed that the same is a lien. *Luft v. Steamboat Envoy*, 476.
 7. *Martin v. White*, 11 Mo. Rep. 214, and *Starr v. Stewart*, 18 Mo. Rep. 410, affirmed. *Milligan v. Dunn*, 643.

LANDLORD AND TENANT.

See SALES, 14.

1. No instrument can be a lease which is not signed by the lessor. *Clemens v. Broomfield*, 118.
2. In a tenancy from year to year, a surrender by operation of law takes place when, by the consent of both parties, another person becomes tenant of the premises, and the landlord collects rent from him. *Ib.*
3. A parol lease, for a term of years, though by the statute of frauds declared to create a tenancy at will, has the effect of creating a tenancy from year to year, such being the established construction. *Kerr v. Clark*, 132.
4. It is not a sufficient plea of a surrender to state that the tenant delivered up possession of the premises to the landlord. It must be stated that the landlord consented to accept the possession and discharge the tenant. *Ib.*
5. Crops sown by a tenant, and afterwards abandoned by him, and harvested by the landlord after the expiration of the lease, are not liable to attachment as the property of the tenant, whether the latter would have had the right to enter upon the land and gather the crops or not. *Hall v. Shannon*, 401.

LANDLORD AND TENANT—(*Continued.*)

6. In the absence of any stipulation in a lease, the lessor is bound to pay taxes on the property, but not on improvements made by the lessee, which the latter is entitled to remove, or to be compensated for, at the expiration of the lease. *Leach v. Goode*, 501.

LANDS AND LAND TITLES.

See PUBLIC LANDS. SCHOOL LAND.

1. Spanish marriage contracts are within the meaning of the act of December 22, 1824, requiring all marriage contracts to be recorded within six months from the taking effect of the act, in order to affect titles, except as between parties thereto and persons having actual notice. *Wilkinson v. Rozier*, 443. *Frissell v. Rozier*, 448.
2. A party cannot in any case obtain the benefit of a confirmation to another, unless it appears that his title was the basis of the confirmation. *Guyol v. Chouteau*, 546.
3. Claimants who failed to exhibit their titles for confirmation before they were barred by acts of congress, cannot afterwards claim the benefit of a confirmation to another. *Ib.*
4. If a person is guilty of a fraud, or affects himself with a trust, in obtaining a confirmation, the party seeking the benefit of it must state these facts as a ground of relief. He cannot recover in a simple action of ejectment. *Ib.*
5. Where there are conflicting claims, the one confirmed is the better title. *Ib.*
6. In order that a claim should have been confirmed by the act of July 4, 1836, it was not necessary that the board of commissioners should *in terms* recommend it for confirmation. The statement of the opinion of the board that it was already confirmed by the act of 1812, is sufficient. *Soulard v. Clark*, 570.
7. Where there was a partition of a joint concession, a confirmation by the act of 1812 would enure to the benefit of each claimant for the portion set apart to him. *Ib.*
8. The act of June 13, 1812, operates as a complete grant. The claimant did not forfeit his rights by a failure to prove up his claim under the act of May 26, 1824, but may establish it in the courts by oral proof of inhabitation, cultivation or possession prior to December 20, 1803. *Ib.*
9. It is settled that a certificate by recorder Hunt, under the act of 1824, is *prima facie* evidence of a confirmation by the act of 1812, and that an official survey is *prima facie* evidence of the true location of the land confirmed. *Joyal v. Rippey*, 660.
10. It is no impeachment of a survey, of a confirmation by the recorder of land titles under the act of 1824, that it includes less than the quantity claimed before the recorder. So, the mere fact that there is not enough land in a block to satisfy all the claims proved before the recorder, does not show that a survey of one of the lots, including less than the quantity claimed, is erroneous, or that the surveys of the other lots, including the full quantity claimed, are erroneous. *Ib.*

LARCENY.

See SLAVE, 1. INDICTMENT, 5. PRACTICE AND PROCEEDINGS IN CRIMINAL CASES, 2. EVIDENCE, 7.

1. There can be no larceny without a felonious intent. *State v. Gresser*, 247.
2. A purse accidentally left in a store is not lost, and a party who takes it with a felonious intent is guilty of larceny. *State v. McCann*, 249.

LAW COMMISSIONER.

1. The law commissioner's court has no authority to make an order for the sale of a boat, or to distribute the proceeds. *Blaisdell v. Steamboat Wm. Pope*, 538.

LEASE.

See LANDLORD AND TENANT.

LEGACY.

See WILL, 1.

LIBEL AND SLANDER.

1. Under the new code, (art. 7, sec. 10,) in an action of libel or slander, a petition is sufficient, which states that the defamatory matter was published or spoken of the plaintiff, without stating any extrinsic facts for the purpose of showing its application. *Stieber v. Wensel*, 513.
2. Words which involve a charge of adultery are actionable by statute, without alleging special damage. *Ib.*

LICENSE.

See GROCERIES AND DRAM SHOPS. INJUNCTION, 1. INSURANCE, 2.

LIEN.

See MORTGAGE, 1, 2. BOATS AND VESSELS, 6, 7, 8. JUDGMENT, 6.

1. As to the vendor's lien for the purchase money of land, and what is or is not a waiver of it. *Delassus v. Poston*, 425.
2. Where a vendor of land executes a bond, conditioned to convey upon a specified day, subsequent to the time when the purchase money becomes due, a conveyance will not be enforced until the purchase money is paid, although, by the terms of the bond, the conveyance is not expressly made to depend upon the payment of the purchase money. *Ib.*
3. The fact that the vendor procures the notes given for the purchase money to be allowed against the estate of the vendee, is not a waiver of his right to resort to the land. *Ib.*
4. The fact that the equitable interest of the vendee is sold at administration sale, by request of the vendor, who retains the legal title, is not a waiver of the latter's right to enforce his lien against the land in the hands of a purchaser with notice. The right of the purchaser is, to have a deed upon paying the unpaid balance of the purchase money. *Ib.*

LIFE INSURANCE.

See INSURANCE, 6.

LIMITATIONS.

1. Where one of several parties, who were bound by an agreement to pay such assessments as might be made upon them for a specified purpose, failed to pay the assessments made against him, and they were paid by the others, *it was held* that the statute of limitations did not begin to run to prevent a recovery back until the date of the last payment. *Finnney v. Brant*, 42.
2. The statute of limitations cannot be taken advantage of by demurrer. *Smith & Kinzer v. Dean*, 63.
3. Where a minor *feme covert* joined with her husband in a deed conveying a lot belonging to her, *it was held*, that possession under the deed was adverse to any interest in the lot subsequently acquired by the wife, and adverse to any outstanding interests, and did not, as to such interests, enure to the benefit of the wife. *Norcum v. Gaty*, 65.
4. The possession of a specific portion of a tract of land by one party, will not aid another party, claiming a different portion of the same tract under the same grantor, in establishing an adverse possession of twenty years against the rightful owner. *Robert v. Walsh*, 452.
5. The statute of limitations only commences running against an administrator from the date of his letters. *Polk's Adm'r v. Allen*, 467.
6. The statute of limitations does not run against the state. *State v. Fleming*, 607.
7. Twenty years' adverse possession before ouster will sustain an action of ejectment. *Joyal v. Rippey*, 660.

MALICIOUS PROSECUTION.

See ATTACHMENT, 4.

1. In an action for a wrongful prosecution, a petition which omits to state that the prosecution was malicious, and that the plaintiff was acquitted, is insufficient. *Mooney v. Kennett*, 551.

MANDAMUS.

1. No appeal lies from the refusal of an application for a mandamus. *Ex parte Skaggs*, 339.
2. The new code does not apply to proceedings upon mandamus. *Smith v. St. Francis County Court*, 433.

MARRIAGE CONTRACTS.

1. Spanish marriage contracts are within the meaning of the act of December 22, 1824, requiring all marriage contracts to be recorded within six months from the taking effect of the act, in order to affect titles, except as between parties thereto and persons having actual notice. *Wilkinson v. Rozier*, 443.
2. Under a marriage contract which reserved to the wife the ownership of her personal property, free from liability for the debts of her husband,

MARRIAGE CONTRACTS—(Continued.)

with power to dispose of the same by will or otherwise, during the marriage, it was held that the wife retained an absolute estate. *Logan's Adm'rs v. Logan's Ex'rs*, 465.

MASTER AND SERVANT.

See PRACTICE, 19.

1. A servant employed by the year, at fixed wages, cannot recover anything for his services, if he quits without cause before the expiration of the year. *Schnerr v. Lemp*, 40.
7. A plaintiff cannot recover compensation for merely voluntary services bestowed under no employment from the defendant. *Lynch v. Bogy*, 170.

MORTGAGE.

See PROMISSORY NOTES, 10, 11, 12. PRINCIPAL AND SURETY, 2, 3, 4. FRAUDULENT CONVEYANCES, 4. SALE, 12.

1. A mortgage with power of sale provided that the money arising from a sale should be applied to the payment of the debts mentioned in the deed, and the surplus, if any, should be paid to the grantor or his order. At the foot of the deed was this memorandum, proved to have been made before execution, at the request of the grantor: "I also owe P. F. \$400 and A. K. \$200, with interest, which are to be paid and made liens with the above." Held, the memorandum was to be taken as part of the deed, and had the effect to make the demands of P. F. and A. K. liens upon the surplus. *Doniphan v. Paxton*, 288.
2. Where P. F. proved an indebtedness to the amount secured by the deed, and claimed nothing more, in a controversy between him and a subsequent incumbrancer, it was held immaterial whether the note presented by him as evidence of the debt imported on its face a valuable consideration or a gratuity. *Ib.*
3. Where property was conveyed to A., with a clause of defeasance if the grantor should, within five years, pay a debt due from him to B., and A., treating the conveyance as a mortgage, obtained judgment of foreclosure upon the cognovit of the grantor in a suit to which B. was not a party, it was held that the title of the purchaser at a sale under the judgment could not be disputed in a collateral proceeding. *Miles v. Darts & Taylor*, 408.

NEW CODE.

See PRACTICE.

NEW TRIAL.

1. Affidavit by a party that he authorized his attorney to accept an offer of compromise, and supposed that he had done so, and so gave the suit no attention, is no ground for a new trial. *Patchin v. Wegman*, 151.
2. Separation of jury in a criminal case no ground for a new trial, unless they have been tampered with. *State v. Barton*, 227.

NUISANCE.

1. The mere fact that one proprietor, in building a house, inserts his joists in the wall of an adjoining proprietor, without license, will not authorize the interference of a court by injunction to remove the joists, although it is sufficient to entitle the party whose wall is thus used to recover damages. To obtain an injunction, he must show some special facts which entitle him to this extraordinary remedy. *Rankin v. Charless*, 490.

OFFICER.

See AMENDMENT, 1. SHERIFF. CONSTABLE. CONTRACTS, 6.

1. An officer seizing a boat has no authority to hold her without bond, subject to final process in the suit. It is his duty to apply for an order of sale, unless she is bonded within five days, under the ninth or tenth sections of the act concerning boats and vessels. (R. C. 1845.) *Blatsdell v. Steam Ferry Boat Wm. Pope*, 538.

OFF-SET.

See SET-OFF.

PARENT AND CHILD.

1. A trust results to a father, who advances money to his son to enter land for him, with which the son enters the land in his own name. *Valle v. Bryan*, 423.

PARTITION.

See HUSBAND AND WIFE, 6.

PARTNERSHIP.

See PRACTICE, 37. EVIDENCE, 18.

1. Where two partners purchased a leasehold with partnership funds, and gave a deed of trust upon it, and after the death of one of them, the lease was sold under the deed of trust, *it was held*, that the lease was to be treated as partnership property, so as to entitle the surviving partner to administer the deceased partner's share of the surplus, after paying the debt, and not the administrator. *Carlisle's Adm'r v. Mulhern & Keyser*, 56.
2. When a note is payable to J. A. H., and there is a firm composed of J. A. H. and others, doing business under the style of J. A. H., but no evidence is offered to show to whom or on what account the note is given, it will be presumed to have been given to J. A. H. individually. *Boyle v. Skinner*, 82.
3. A release of a parol contract before breach need not be under seal. Thus, where goods are consigned to two partners for sale, one of them, who retires from the firm before the goods are sold, and is verbally released, is not liable for goods subsequently sold by the remaining partner. *Robinson v. McFaul*, 549.

PARTNERSHIP—(*Continued.*)

4. One partner who confesses an action is, under the code, a competent witness against his co-partner who defends it. *Ib.*

PAYMENT.

See PRINCIPAL AND SURETY, 2, 3, 4. PLEADING, 42. PRACTICE, 14.

1. Where A., in payment of a debt due to him from B., agrees to accept an order on C. for a debt due from C. to B., B. is not released from liability until he makes such a transfer of the debt on C., as to enable A. to claim it in his own name. *Coy v. DeWitt*, 322.
2. The acceptance by a creditor of the note of a third party for a debt is not *prima facie* an absolute payment. To have that effect, it must be agreed that it should be taken in satisfaction. *Appleton v. Kennon*, 637.

PLEADING.

See SUPREME COURT, 6. PRACTICE, 24. JUDGMENTS OF SISTER STATES, 2. SURVEY, 1. LIMITATION, 2. PROMISSORY NOTES, 6.

1. The petition stated that the defendant was indebted to the plaintiff for stall No. 20 in the North Market, which was purchased by the plaintiff from a third party for defendant at his special instance and request. The proof was that the plaintiff bought the stall for himself, and afterwards sold it to the defendant. *Held*, this was an entire failure of proof of the cause of action alleged in the petition, (within the meaning of section 3 of art. 11 of the new code of practice,) and not a mere variance. *Beck v. Ferrara*, 30.
2. Where several parties interested in resisting a suit, appointed a committee of their number to employ counsel and conduct the defence, and agreed in writing to pay to the committee such *pro rata* assessments as might be made against them to defray the expenses of the defence, and one of the parties to the agreement failed to pay the amount assessed against him, which was thereupon made up by the committee, *it was held*, that each member of the committee might sue separately for the amount paid by him. *Finney v. Brant*, 42.
3. Under the new practice, a party suing upon a bond must state his title in his petition. It is not sufficient to aver that he is the legal holder. *Smith & Kinzer v. Dean*, 63.
4. A party sued upon a note, who relies upon the defence that it was given for a wager upon an election, under section 10 of the act concerning "gaming" (R. C. 1845) must state in his answer, not only that the election was one authorized by the constitution and laws of the state, but what particular election it was, between whom pending, &c., or he will be precluded from giving evidence on the subject. *Sybert v. Jones*, 86.
5. A. conveyed personal property to B., in trust to secure the payment of a debt to C. Afterwards, A. conveyed the same property directly to C. *Held*, a suit against D. to recover possession of the property was properly brought in the name of B. *Bergesch v. Keevil*, 127.

PLEADING—(Continued.)

6. The plaintiff sued for services from January 17 to June 15, 1853. The defendants answered that, *on or about* January 17, 1853, the plaintiff contracted to serve them for one year from January 17, and that he quit without cause before the expiration of the year. This answer was stricken out for the reason that, consistently with its allegations, the contract might have been made *prior* to January 17, for a year's service to commence at a future day, which would be within the statute of frauds. *Held*, it was error to strike out the answer, that section of the code being applicable, which says that the allegations of pleadings shall be liberally construed, with a view to substantial justice. *Bersch v. Dittick*, 129.
7. It is not a sufficient plea of a surrender to state that the tenant delivered up possession of the premises to the landlord. It must be stated that the landlord consented to accept the possession and discharge the tenant. *Kerr v. Clark*, 132.
8. Under the code, the assignee of an account may sue in his own name. *Smith v. Schibel*, 140.
9. In a declaration upon a collector's bond, the breach assigned was, that the defendant collected a specified amount which he failed to pay over. The plea was, that defendant collected the amount named in the breach, and paid the same over, and that this was all the money collected by him. The replication denied that this was all the money collected by the defendant. *Held*, the replication was bad for departure, and as tendering an immaterial issue. *Stute v. Grimsley*, 171.
10. A count in a declaration upon a collector's bond which fails to show that the money which he failed to pay over was collected during his *term of office* is bad. *Ib.*
11. A variance between the petition and the evidence, as to the manner in which the negligence of the defendant operated to occasion the loss sued for, is not material under the new practice. *Reeves v. Larkin*, 192.
12. A debt evidenced by a note which is lost may be assigned, so as to enable the assignee to sue in his own name. *Long v. Constant*, 320.
13. A petition for a divorce which only charges, in general terms, that one party offered to the other indignities which rendered his or her condition intolerable, is not sufficiently specific under the statute. *Bowers v. Bowers*, 351.
14. A petition for a divorce on the ground of the absence of the defendant for more than two years, must allege that the absence was without reasonable cause. *Freeland v. Freeland*, 354.
15. In an action on a receipt which stated that the defendant had received from the plaintiff a demand for collection, and that he would either collect the same or return the evidence of it, a petition is sufficient which states that the defendant executed the receipt, that he had collected the money and had failed to pay the same to plaintiff, although there is no express averment that the defendant promised to pay the

PLEADING—(Continued.)

- money when collected to the plaintiff, or that it belonged to the plaintiff. *Ramsours v. Campbell*, 358.
16. A statement in a petition that the plaintiff sued in the capacity of administratrix *was held* a sufficient allegation that she was administratrix. *Duncan v. Duncan*, 368.
 17. A suit upon a sheriff's bond is properly brought in the name of the state. *State v. Moore*, 369.
 18. In an action against the executor of an executor upon the latter's bond, it is necessary that the declaration should allege that neither the executor, in his life time, *nor his executor since*, have performed the act required by law or the order of the court. Such an allegation will not make the declaration bad for a misjoinder of actions. *State v. Petticrew's Executor*, 373.
 19. Where persons are made trustees for the payment of debts or legacies, the rights of the creditors or legatees will be bound by a judgment fairly obtained, in a proceeding in which the trustees are parties, although the creditors or legatees are not before the court. *Miles v. Davis & Taylor*, 408.
 20. A wife residing with her husband upon land cannot, under ordinary circumstances, be joined as a defendant, in an action of ejectment. *Meehan v. Gunsollis*, 417.
 21. Under the new code, it is not necessary that facts should be stated in a pleading according to their legal effect. *Page v. Freeman*, 421.
 22. Several parties engaged in an assault and battery, may be sued jointly or separately. *Ib.*
 23. In a suit upon a note, under the code, an answer, which denies any knowledge sufficient to form a belief as to whether the plaintiffs compose the firm to whose order the note is payable, is erroneously stricken out. *Wales v. Chamblin*, 500.
 24. Under the new code, (art. 7, sec. 10,) in an action of libel or slander, a petition is sufficient, which states that the defamatory matter was published or spoken of the plaintiff, without stating any extrinsic facts for the purpose of showing its application. *Stieber v. Wensel*, 513.
 25. A denial of indebtedness is not a sufficient answer to a petition which sufficiently charges that the indebtedness arose out of breaches of a specific contract. The breaches must be denied. *Engler v. Bate*, 543.
 26. Under the code, where several causes of action are united, each one must be separately stated. (*Childs v. Bank of Mo.*, 17 Mo. Rep. 213, affirmed.) *Mooney v. Kennett*, 551.
 27. Where several causes of action are joined in one petition, there should be a separate assessment of damages or verdict in each cause. A general verdict for the plaintiff, it seems, will not stand, if one of the causes of action, as stated, is insufficient to support a judgment. *Ib.*
 28. Where several causes of action are blended in violation of the rules of pleading, the proper way of correcting the irregularity would seem to be by motion to compel an election. *Ib.*

PLEADING—(Continued.)

29. In an action for a wrongful prosecution, a petition which omits to state that the prosecution was malicious, and that the plaintiff was acquitted, is insufficient. *Ib.*
30. Courts do not take judicial notice of city ordinances. If a party relies on an ordinance, he should set it out in his pleading. *Ib.*
31. A simple denial is a sufficient answer to a simple allegation of indebtedness. *Westlake v. Moore*, 556.
32. An answer to a petition on a note which states that the defendant "paid the plaintiff two sums of money which extinguished the note," is sufficient under the code, the amount of the alleged payments exceeding the amount of the note. *Joy v. Cooley*, 645.
33. An allegation in a petition, not material to the plaintiff's right of action, is not admitted by a failure to deny it in the answer. Thus, the value of an article for which a plaintiff seeks to recover is not admitted if not denied. *Wood v. Steamboat Fleetwood*, 529.

PRACTICE.

See PLEADING. LIMITATIONS, 2. SUPREME COURT. NEW TRIAL. DEPOSITION, 1. PRACTICE AND PROCEEDINGS IN CRIMINAL CASES. GARNISHMENT, 4.

1. The petition stated that the defendant was indebted to the plaintiff for stall No. 20 in the North Market, which was purchased by the plaintiff from a third party for the defendant at his special instance and request. The proof was, that the plaintiff bought the stall for himself, and afterwards sold it to the defendant. *Held*, this was an entire failure of proof of cause of action alleged in the petition, (within the meaning of section 3, of article 11, of the new code of practice,) and the not a mere variance. *Beck v. Ferrara*, 30.
2. Where a cause is tried by a court, the supreme court will not review the finding unless a motion for a review is made below. *Raymond & Kendall v. Edgar & Walsh*, 32.
3. Where the plaintiff in an ejectment suit dies, the suit may be revived in the name of his heirs or devisees. *Fine v. Gray*, 33.
4. Although under the new practice a party may be substituted *on motion*, yet it can only be on the voluntary appearance of the adverse original party, or after the service upon such party of a *scire facias*. *Ib.*
5. The provision in the revised code of 1845, that a *scire facias* for the substitution of a plaintiff in the place of the original, must be sued out before the expiration of the third day of the second term next after the term at which the death or disability of the original party shall be stated upon the record, is still in force. *Ib.*
6. All cases originating in the St. Louis court of common pleas, where there has been twenty days' personal service, are triable at the first term, notwithstanding the new code of practice. *Finney v. Brant*, 42.
7. Under the new practice, a court trying a cause without a jury need not set out in its finding those facts admitted in the pleadings. *Carlisle's Adm'r v. Mulhern & Keyser*, 56.

PRACTICE—(Continued.)

8. Law and equity being now blended, an equitable title arising out of a contract for the sale of land is a good defence to an action instituted to recover possession of the land. *Tibean v. Tibean*, 78.
9. The new practice (except the 25th article) is not applicable to the proceedings in causes taken from justices of the peace. *Boyle v. Skinner*, 82.
10. It is error to instruct that a plaintiff cannot recover, if he offers any evidence whatever tending to establish his cause of action. *Houghtaling v. Ball & Chaptn*, 84.
11. It is error to refuse to permit a plaintiff to take a non-suit. *Templeton & McKee v. Wolff*, 101.
12. A general stipulation that the minutes of the testimony of a witness on a former trial may be read in evidence, extends to any number of subsequent trials; nor is it necessary that the stipulation should have been filed among the papers in the cause. *Carroll v. Paul's Adm'r*, 102.
13. Instructions are still proper on a trial without a jury, in cases appealed from justices of the peace. *Clemens v. Broomfield*, 118.
14. A court trying a case without a jury should find all the facts upon the legal effect of which there is really a dispute between the parties. Thus, where a defendant, who was sued upon a note and pleaded payment, gave evidence of certain facts, which he claimed amounted to payment, *it was held*, a general finding that the defendant was indebted to the plaintiff, was not sufficient. *Farrar v. Lyon*, 122.
15. The attachment law of 1845, and not the new code, governs as to the publication of notice to non-resident defendants in attachment suits. *Gates v. Clavadetscher*, 125.
16. No finding of facts is necessary upon an inquiry of damages after a judgment by default. *Ib.*
17. A. conveyed personal property to B., in trust to secure the payment of a debt to C. Afterwards, A. conveyed the same property directly to C. *Held*, a suit against D. to recover possession of the property was properly brought in the name of B. *Bergesch v. Keevil*, 127.
18. A petition filed for the recovery of personal property was not verified by affidavit. The plaintiff swore to the petition before a justice, but the justice failed to annex his certificate. *Held*, the plaintiff might be permitted to verify the petition *nunc pro tunc*. *Ib.*
19. The plaintiff sued for services from January 17 to June 15, 1853. The defendants answered that, *on or about* January 17, 1853, the plaintiff contracted to serve them for one year from January 17, and that he quit without cause before the expiration of the year. This answer was stricken out for the reason that, consistently with its allegations, the contract might have been made *prior* to January 17, for a year's service to commence at a future day, which would be within the statute of frauds. *Held*, it was error to strike out the answer, that section of the code being applicable, which says that the allegations of pleadings shall

PRACTICE—(Continued.)

- be liberally construed, with a view to substantial justice. *Bersch v. Dittrick*, 129.
20. The assignee of an account may sue in his own name. *Smith v. Schibel*, 140.
21. A warrant against a boat issued in the name of one of the plaintiffs only. Upon a motion, filed after the seizure and sale of the boat, to quash the writ and all proceedings, *held*, that the writ might be amended and would be considered as amended. (*Jones v. Cox*, 7 Mo. Rep. 173, affirmed.) *Jarbee v. Steamboat Daniel Hillman*, 141.
22. A finding of facts is necessary on the trial by a circuit court of a cause appealed from a county or probate court. *Walsh v. Edmonson*, 142.
23. An instruction which tells the jury that they may infer a certain fact from other facts proved, is not the decision of any question of law, unless the presumption is one which the law raises. *McDermott v. Barnum & Moreland*, 204.
24. A debt evidenced by a note which is lost may be assigned, so as to enable the assignee to sue in his own name. *Long v. Constant*, 320.
25. Where the trial is by the court, and no motion for a review is made, as required by the code, the supreme court will only look to see whether the facts found support the judgment. *Freeland v. Eldridge*, 325.
26. A finding of the facts which merely states that the defendant was guilty of acts and abuse which were indignities, without stating the nature of the acts or abuse, is not sufficient to support a decree for a divorce. *Bowers v. Bowers*, 351.
27. It is error to instruct a jury to presume one fact from another fact proved, unless the presumption is one which the law raises. *Glover's Adm'rs v. Duhle*, 360.
28. A suit upon a sheriff's bond is properly brought in the name of the state. *State v. Moore*, 369.
29. A referee need not report his decision in admitting or rejecting a witness or testimony, unless required so to do by the order of reference. *State v. Petticrew's Ex'r*, 373.
30. Under the code, it is improper to dismiss a suit because all are not made parties who should have been, the court having power to order others interested to be made parties. *Hayden's Ex'rs v. Marmaduke*, 403.
31. The refusal of a court to give an instruction asked by a party is not equivalent to the assertion of the converse proposition of law. *Miles v. Davis & Taylor*, 408.
32. An officer executing process may amend his return by leave of court, after the expiration of his official term. *Blaisdell v. Steamboat Wm. Pope*, 157. *Miles v. Davis & Taylor*, 408.
33. The new code does not apply to proceedings upon mandamus. *Smith v. St. Francois County Court*, 433.
34. In a proceeding to set aside a will, it is erroneous to arrest a judgment

PRACTICE—(Continued.)

- as to some of the defendants, and enter a final judgment against the others. *Rush v. Rush*, 441.
35. A judgment against an infant, who appears by attorney, is erroneous. *Ib.*
36. Under the code, a plaintiff is entitled to all the relief that he could formerly have obtained both from a court of law and equity upon the facts. *Rankin v. Charless*, 490.
37. In a suit upon a note under the code, an answer which denies any knowledge sufficient to form a belief, as to whether the plaintiffs compose the firm to whose order the note is payable, is erroneously stricken out. *Wales v. Chamblin*, 500.
38. The court trying an issue made by an interplea in an attachment suit must find the facts, as required by the code. *Skitner v. Thompson*, 528.
39. An allegation in a petition, not material to the plaintiff's right of action, is not admitted by a failure to deny it in the answer. Thus, the value of an article for which a plaintiff seeks to recover is not admitted if not denied. *Wood v. Steamboat Fleetwood*, 529.
40. An inconsistent instruction is erroneous. *Ib.*
41. A denial of indebtedness is not a sufficient answer to a petition which sufficiently charges that the indebtedness arose out of breaches of a specific contract. The breaches must be denied. *Engler v. Bate*, 543.
42. A case where the answer filed sets up no sufficient defence is not one coming within the rule of the St. Louis circuit court, requiring the plaintiff to file an abstract of the pleadings. *Ib.*
43. Under the code, where several causes of action are united, each one must be separately stated. (*Childs v. Bank of Mo.*, 17 Mo. Rep. 213, affirmed.) *Mooney v. Kennett*, 551.
44. Where several causes of action are joined in one petition, there should be a separate assessment of damages or verdict in each cause. A general verdict for the plaintiff, it seems, will not stand, if one of the causes of action, as stated, is insufficient to support a judgment. *Ib.*
45. Where several causes of action are blended in violation of the rules of pleading, the proper way of correcting the irregularity would seem to be by motion to compel an election. *Ib.*
46. Courts do not take judicial notice of city ordinances. If a party relies on an ordinance, he should set it out in his pleading. *Ib.*
47. A simple denial is a sufficient answer to a simple allegation of indebtedness. *Westlake v. Moore*, 556.
48. It is no error to refuse an instruction based upon a state of facts of which there is no evidence, or the principle of which is embodied in another instruction given. *Rogers v. McCune*, 557.
49. Where a record is proper evidence of a fact, it will be admitted, and the opposite party is left to his motion, to exclude irrelevant matter in the record from the consideration of the jury. *Soulard v. Clark*, 570.

PRACTICE—(Continued.)

50. It is irregular practice for a court to comment upon evidence by way of instruction to a jury. *Loehner v. Home Mutual Insurance Co.*, 628.
51. On the trial of appeals from justices of the peace, declarations of law must be asked and exceptions taken, or the supreme court will not interfere. *Moore v. Turner*, 642.
52. Where a defendant upon whom an order for the production of a paper is made, answers that the paper is in the hands of a third party, by whom it is held for defendant and others, but does not state that the paper is not *under his control*, it is no error for the court to take the contents of the paper, as stated by the plaintiff in his petition to be true. *Munford v. Wilson*, 669.
53. Where a party who was sued upon a note filed a plea of the general issue with notice of off-set, and two terms afterwards was allowed to file an amended plea with affidavit, denying the execution of the note, the supreme court refused to interfere with the discretion exercised by the circuit court in allowing the amended plea. *Pomeroy's Adm'r v. Brown & Durley*, 302.

PRACTICE AND PROCEEDINGS IN CRIMINAL CASES.

See JUSTICES' COURTS, 3. APPEAL, 5.

1. No appeal lies in favor of a slave convicted before a justice of the peace of petit larceny. *State v. Joe*, 223.
2. Under section 22 of article 3 of the act concerning practice and proceedings in criminal cases, an indictment for petit larceny is properly quashed, unless the name of a prosecutor is endorsed upon it, or a statement which brings it within the exceptions to the requirement that the name of the prosecutor be thus endorsed. *State v. Jotner*, 224.
3. Separation of a jury in a criminal case no ground for a new trial, unless they have been tampered with. (*State v. Whitney*, 8 Mo. Rep. 165, affirmed.) *State v. Barton*, 227.
4. A verdict in a criminal case which incorrectly states the name of the party indicted, will not support a judgment. *State v. McBride*, 239.
5. Such a mistake cannot be amended after the separation of the jury. *Ib.*
6. A circuit attorney can make no agreement which will discharge a criminal from responsibility for an offence. *State v. Lopez*, 254.
7. A circuit attorney, in open court, agreed with a defendant, against whom several indictments were pending, that, if he would plead guilty as to some, he should be discharged from the others. The defendant accordingly pleaded guilty to four of the indictments, and a *nol. pros.*, in the ordinary form, was entered on the record as to the remainder. *Held*, the entry of a *nol. pros.* could not be held to have the legal effect of a *retraxit*, by reason of the agreement. *Ib.*
8. The supreme court will not reverse a judgment in a criminal case for error committed by the inferior court in quashing one count of an indictment, where the record shows that the defendant has been tried and acquitted on the remaining count or counts. *State v. Leapfoot*, 375.

PRACTICE—(Continued.)

9. The supreme court will not, for any reason, disturb a judgment in a criminal case after a verdict of acquittal. *State v. Baker*, 683.

PRESUMPTION.

See PARTNERSHIP, 2. ADMINISTRATION, 3. PRACTICE, 23, 27.

PRINCIPAL AND AGENT.

See EVIDENCE, 1. BOATS AND VESSELS, 8.

PRINCIPAL AND SURETY.

1. The relation of principal and surety or of co-securities is not extinguished by judgment. Thus, where A. recovered against B. & C. as securities in a note, a judgment which was afterwards assigned to D., who directed the sheriff to return an execution issued thereon unsatisfied, when one half of the judgment debt might otherwise have been made out of the property of B., it was held, that C. was discharged to the extent of one half of the debt. *Rice v. Morton*, 263.
2. The payee of a note will be entitled to the benefit of any counter security given for the indemnity of an indorser, and a party to whom the debt evidenced by the note is transferred, will also be entitled to the benefit of the counter security. (*Haven v. Foley & Papin*, 18 Mo. Rep. 136, affirmed.) *Haven v. Foley & Papin*, 632.
3. Where the payee of a note, indorsed by one who holds a deed of trust for his indemnity, agrees to accept the note of a third party, and substitute him as the creditor of the maker of the original note, to which agreement the indorser is a party, the substituted creditor will be entitled to the benefit of the deed of trust, although it was a part of the agreement that the original note should be delivered to the indorser. *Ib.*
4. The substituted creditor, when sued for the property by a subsequent incumbrancer, will be protected in equity, although the note was not assigned to him, if the debt evidenced by the note was transferred to him. *Ib.*

PROCESS.

See BOATS AND VESSELS, 1, 2, 3, 4, 5. AMENDMENT, 1.

PROMISSORY NOTES.

See EVIDENCE, 1. BILLS OF EXCHANGE. USURY. SUPREME COURT, 6. PAYMENT, 2. PLEADING, 42. SECURITIES, 2.

1. The indorser of a negotiable note is not a security within the meaning of the act concerning securities, (R. C. 1845.) *Clark v. Barrett*, 39.
2. Where a note is payable to J. A. H. and there is a firm composed of J. A. H. and others, doing business under the style of J. A. H., but no evidence is offered to show to whom or on what account the note is given, it will be presumed to have been given to J. A. H. individually. *Boyle v. Skinner*, 82.

PROMISSORY NOTES—(Continued.)

3. A note will not be avoided by duress of imprisonment under legal process, unless there has been an improper use made of the process, either in wilfully employing it to imprison the defendant upon a demand that was groundless, or knowingly exaggerated, or unless there has been a subsequent abuse of the process, and an advantage gained thereby. *Holmes v. Hill*, 159.
4. It is no objection to a recovery on a note, that it was indorsed to the plaintiff after it was due and without consideration, no defence being shown. *Powers v. Nelson*, 190.
5. A note was payable to the order of "I. J. C., guardian," &c. Held, an endorsement by I. J. C. passed the title to a party who received for value and in good faith: the words "guardian," &c., being mere words of description. *Thornton v. Rankin*, 193.
6. Suit may be maintained in the name of a county upon a note payable to the county to the use of the state school fund. *Barry County v. McGlothlin*, 307.
7. A debt evidenced by a note which is lost may be assigned, so as to enable the assignee to sue in his own name. *Long v. Constant*, 320.
8. In a suit upon a note, under the code, an answer, which denies any knowledge sufficient to form a belief, as to whether the plaintiffs compose the firm to whose order the note is payable, is erroneously stricken out. *Wales v. Chamblin*, 500.
9. A note given to a constable for forbearance to levy an execution is void. *Ashby v. Dillon*, 619.
10. The payee of a note will be entitled to the benefit of any counter security given for the indemnity of an indorser, and a party to whom the debt evidenced by the note is transferred, will also be entitled to the benefit of the counter security. (*Haven v. Foley & Papin*, 18 Mo. Rep. 136, affirmed.) *Haven v. Foley & Papin*, 632.
11. Where the payee of a note, indorsed by one who holds a deed of trust for his indemnity, agrees to accept the note of a third party, and substitute him as the creditor of the maker of the original note, to which agreement the indorser is a party, the substituted creditor will be entitled to the benefit of the deed of trust, although it was a part of the agreement that the original note should be delivered to the indorser. *Ib.*
12. The substituted creditor, when sued for the property by a subsequent incumbrancer, will be protected in equity, although the note was not assigned to him, if the debt evidenced by the note was transferred to him. *Ib.*

PUBLIC LANDS.

See LANDS AND LAND TITLES.

1. An entry of public land gives no title to timber cut and lying upon the land at the time of entry. *Keeton v. Audsley*, 362.

QUARANTINE LAWS.

See CONSTITUTION.

RAPE.

See CRIMES AND PUNISHMENTS, 6, 7, 8.

RECEIPT.

See PLEADING, 25.

RELATION.

1. A tax deed does not relate back to the sale. *Donohoe v. Veal*, 331.

RELEASE.

See CONTRACTS, 5. PARTNERSHIP, 3. HUSBAND AND WIFE, 6.

REPLEVIN.

See CLAIM AND DELIVERY OF PERSONAL PROPERTY.

RETURN.

See BOATS AND VESSELS, 2, 3, 4.

1. An officer executing process may amend his return by leave of court, after the expiration of his official term. *Miles v. Davis & Taylor*, 408.

REVENUE.

See TAXES, 1, 2.

1. Under the revenue act of 1845 and the amendatory act of 1847, no title to land sold for taxes passes until a deed is executed by the register. The deed does not relate back to the sale. *Donohoe v. Veal*, 331.
2. The fourth section of the amendatory revenue act of March 12, 1849, only applies where the sale was made after its passage. *Ib.*

RIOT.

1. It is not a presumption of law that every one present at a riot, and not actually aiding in the suppression, is guilty, unless he proves his non-interference. *State v. McBride*, 239.

ROADS AND HIGHWAYS.

1. An appeal lies from the order of a county court changing a road, in favor of a party whose land is taken, and in the present case, the county was held to have been properly made a party to the proceeding. *County of Cooper v. Geyer*, 257.
2. Under the 20th section of the first article of the act for opening and repairing roads and highways, approved March 26, 1845, a county court has no right to turn a road on another's land against his consent. That section is not repealed by the act of January 25th, 1847. *Ib.*
3. In opening new roads, the land of individuals who do not consent, can only be condemned in the mode prescribed by the 7th, 8th, 9th and 10th sections of the act of March 3d, 1851. *Ib.*

SALES.

- See FRAUDS AND PERJURIES, 3, 4, 5. ADMINISTRATION, 2, 3, 10, 11, 12, 13, 14, 15, 16. JUDICIAL SALE. TAXES, 3, 4. MORTGAGE, 3.
1. A party who purchases goods on credit, knowing at the time his insolvency and inability to pay for them, but without a preconceived design not to pay, is not guilty of such fraud as will avoid the sale. *Bidault v. Wales*, 36.
 2. Possession of land under a contract of sale and payment of the purchase money is a good defence to an action brought by the vendor for the possession. *Tibean v. Tibean*, 78.
 3. A bill of sale stated that A. "sold and passed" to B. a quantity of hemp. *Held*, the title passed, notwithstanding the bill of sale provided that A. was to perform certain labor to prepare the hemp for market. *Swartz v. Chappell*, 304.
 4. A bill of sale stated that B. had sold to S. "a negro woman named Lucy, for a slave during life, aged forty-one or two years, stout and healthy." *Held*, the words "stout and healthy" constituted a warranty of soundness. *Steel v. Brown*, 312.
 5. An entry of public land gives no title to timber cut and lying upon the land at the time of entry. *Keeton v. Audsley*, 362.
 6. A debtor who employs another to buy in his property, at a sheriff's sale, with no other view than to prevent a sacrifice of it, is not guilty of a fraud. *Lee v. Lee*, 420.
 7. A resulting trust is an equitable estate which may be sold at administration sale. *Valle v. Bryan*, 423.
 8. As to the vendor's lien for the purchase money of land, and what is or is not a waiver of it. *Delassus v. Poston*, 425.
 9. Where a vendor of land executes a bond, conditioned to convey upon a specified day, subsequent to the time when the purchase money becomes due, a conveyance will not be enforced until the purchase money is paid, although, by the terms of the bond, the conveyance is not expressly made to depend upon the payment of the purchase money. *Ib.*
 10. The fact that the vendor procures the notes given for the purchase money to be allowed against the estate of the vendee, is not a waiver of his right to resort to the land. *Ib.*
 11. The fact that the equitable interest of the vendee is sold at administration sale, by request of the vendor, who retains the legal title, is not a waiver of the latter's right to enforce his lien against the land in the hands of a purchaser with notice. The right of the purchaser is, to have a deed upon paying the unpaid balance of the purchase money. *Ib.*
 12. Where a court, by its decree, rescinds a sale and conveyance of land, at the instance of the vendee, a mortgage given for the purchase money is rescinded, as a necessary consequence; and it is error in the decree to award a special execution against the mortgaged property, to satisfy damages allowed to the vendor for the vendee's use of the land. *Coffman v. Huck*, 435.

SALES—(Continued.)

13. Where there is no bad faith, a vendor cannot be made liable for improvements put by the vendee on land, the title to which fails. The measure of damages is the purchase money and interest. *Ib.*
14. A party who enters upon land as a vendee, cannot, upon a subsequent rescision of the contract of sale, be made liable for the rent of the land as a tenant. He is only liable to the extent of the benefit actually derived by him from the use of the land, in ascertaining which, he may be allowed for all outlays in improvements, including those put upon a portion of the land represented, by mistake, to have been embraced in the conveyance to him, but which, in reality, was not. *Ib.*

SCHOOL LAND, (SECTION SIXTEEN.)

1. A reservation from sale, by the act of congress of March 3, 1811, of land claimed before the board of commissioners, was not a disposition of the land, within the meaning of the first clause of the sixth section of the act of March 6, 1820, so as to prevent the same, when designated as a sixteenth section, from passing to the state for the use of schools. *State v. Ham*, 592.
2. The act of March 6, 1820, the ordinance of July 19, 1820, declaring the assent of the people of Missouri to the conditions contained in said act, and the designation of a sixteenth section, vest in the state, for the use of schools, a complete title to land so designated, unless the title had previously passed out of the United States. *Ib.*
3. So, the title of the state, to land designated as a sixteenth section, is superior to a subsequent confirmation, by special act of congress, of a Spanish claim, notice of which had been duly filed with the recorder of land titles; especially when the confirmation professes to be nothing more than a relinquishment of the title remaining in the United States. *Ib.*
4. In an action by the state to recover a sixteenth section, the production of a survey is not necessary, where the answer sufficiently admits that the land claimed has been designated as a sixteenth section. *State v. Fleming*, 607.

SCIRE FACIAS.

See PRACTICE, 4, 5.

SHERIFFS' SALES.

See SALES, 6.

SECURITIES.

1. The indorser of a negotiable note is not a security, within the meaning of the act concerning "securities." (R. C. 1845.) *Clark v. Barrett*, 39.
2. The indorser of a negotiable note is not a security within the meaning of the act concerning securities, (R. C. 1845,) and cannot, after payment of a judgment recovered against him and the maker, obtain judgment against a prior indorser upon motion, under the ninth section of that act. *Devinney v. Lay*, 646.

SET-OFF.

1. *Johnson v. Jones*, 16 Mo. Rep. 494, affirmed. *Brake & Kayser v. Corning*, 125.

SHERIFF.

1. A suit upon a sheriff's bond is properly brought in the name of the state. *State v. Moore*, 369.
2. A sheriff is responsible for all trespasses committed by a deputy by color of his office. *Ib.*
3. The securities in a sheriff's bond are liable for a trespass committed by the sheriff, in seizing property exempt from execution. *Ib.*

SLANDER.

See LIBEL AND SLANDER.

SLAVE.

See CRIMES AND PUNISHMENTS, 6, 7, 8. WARRANTY, 1.

1. No appeal lies in favor of a slave convicted before a justice of the peace of petit larceny. *State v. Joe*, 223.
2. Hiring a slave to haul rails, without the written consent of his master, is not a dealing with the slave, within the meaning of section 33 of the act concerning "slaves," (R. C. 1845.) *State v. Henke*, 225.
3. An indictment of a white person for being present at an unlawful meeting of slaves, must state the facts which constitute the meeting unlawful. *State v. Soot*, 379.

SPANISH LAW.

1. No principle of the Spanish law is known, making an after acquired title enure to the benefit of a former grantee. *Norcum v. Gaty*, 65.

SPECIFIC PERFORMANCE.

1. Where a vendor of land executes a bond, conditioned to convey upon a specified day, subsequent to the time when the purchase money becomes due, a conveyance will not be enforced until the purchase money is paid, although, by the terms of the bond, the conveyance is not expressly made to depend upon the payment of the purchase money. *Delassus v. Poston*, 425.
2. The statutory proceeding against an administrator to enforce the specific performance of an agreement by his intestate to convey land, is permitted only where the contract is in writing. In other cases, the proceeding must be under the general law, and all persons having an interest in the land must be made parties. *Schuller's Adm'r v. Bockwinkle's Adm'r*, 647.

ST. LOUIS.

See TAXES, 1, 2.

STRAYS.

See INDICTMENT, 14.

STRAYS—(Continued.)

1. Under the amendatory act of 1847, the taker up of a stray steer is not required to take the same before a justice of the peace, as required by the act of 1845, concerning "strays." *State v. Williams*, 389.

SUPREME COURT.

See COSTS, 4. PRACTICE AND PROCEEDINGS IN CRIMINAL CASES, 9. JUDGMENT, 5. INFANT, 3.

1. The supreme court will not review a finding of facts unless a case for a review is made below. *Raymond v. Edgar*, 32.
2. The supreme court has repeatedly declared that it will not reverse for the refusal to give instructions, when those given fully present the case to the jury. *Carroll v. Paul's Adm'r*, 102.
3. When it is stipulated that a cause shall be decided in the supreme court upon the facts found by the court below, no other facts will be considered than those contained in the finding. *St. Louis Mutual Fire and Marine Insurance Co. v. Boeckler*, 135.
4. A case will not be reversed because irrelevant evidence was allowed to go to the jury, unless it could have misled or prejudiced the jury. *McDermott v. Barnum & Moreland*, 204.
5. Neither a civil nor a criminal case will be reversed merely because the verdict was against the weight of evidence. *State v. Anderson*, 241.
6. Where a party who was sued upon a note filed a plea of the general issue, with notice of off-set, and two terms afterwards was allowed to file an amended plea with affidavit, denying the execution of the note, the supreme court refused to interfere with the discretion exercised by the circuit court in allowing the amended plea. *Pomeroy's Adm'r v. Brown & Durley*, 302.
7. Where the inferior court gives erroneous instructions, the supreme court will not review the evidence, in order to determine whether the judgment is not for the right party upon all the facts. *Swartz v. Chappell*, 304.
8. In an action against a constable, commenced before a justice, for a false return of an execution, the supreme court refused to disturb a nonsuit taken in the circuit court, it appearing that the execution issued upon an irregular judgment which might have been set aside, and that judgment against the constable was taken before the justice on the return day of the execution without any notice. *Dickerson v. Apperson*, 319.
9. Where the trial is by the court, and no motion for a review is made, as required by the code, the supreme court will only look to see whether the facts found support the judgment. *Freeland v. Eldridge*, 325.
10. The supreme court will not reverse a judgment in a criminal case for error committed by the inferior court in quashing one count of an indictment, where the record shows that the defendant has been tried and acquitted on the remaining count or counts. *State v. Leapfoot*, 375.

SUPREME COURT—(Continued.)

11. A case will not be reversed for the exclusion of evidence, unless an exception is taken at the trial. *Lee v. Lee*, 420.
12. The supreme court can correct no error in a judgment in favor of the appealing party against a party who does not appeal. *Delassus v. Poston*, 425.
13. Judgment affirmed, because no question of law was saved. *Smith v. St. François County Court*, 433.
14. Judgment reversed because the instructions were calculated to mislead. *Klamp v. Rodewalt*, 449.
15. Judgment reversed because the court instructed the jury that there was no evidence on a given point, when the record showed otherwise. *Morse v. Maddox*, 451.
16. The supreme court will not review the discretion exercised by inferior courts in refusing to set aside a judgment by default, on account of the ignorance or mistake of the defendant in failing to file his answer. *Wagemann v. Jordan*, 503.
17. The supreme court will not reverse a cause because a leading question was permitted to be asked a witness. *Rogers v. McCune*, 557.
18. The supreme court will not infer one fact from other facts found by the court below. *St. Louis Hospital Association v. William's Adm'r*, 609.
19. On the trial of appeals from justices of the peace, declarations of law must be asked and exceptions taken, or the supreme court will not interfere. *Moore v. Turner*, 642.
20. The supreme court will not interfere, where a plaintiff voluntarily submits to a nonsuit upon the refusal of the court below to strike out an insufficient answer. *Schulter's Administrator v. Bockwinkle's Administrator*, 647.

SURVEY.

See CONVEYANCE, 10. LAND AND LAND TITLES, 10.

1. In an action by the state to recover a sixteenth section, the production of a survey is not necessary, where the answer sufficiently admits that the land claimed has been designated as a sixteenth section. *State v. Fleming*, 607.
2. An official survey is *prima facie* evidence of the location of land confirmed. *Joyal v. Rippey*, 660.

TAXES.

1. Under the charter of the city of St. Louis, of 1841, there may be different taxes or rates of taxes in the same year, provided the aggregate does not exceed the limit fixed by the charter. *Benoist v. City of St. Louis*, 179.



TAXES—(Continued.)

2. Under that charter, the city council might levy taxes either for the fiscal year or the calendar year, in its discretion. *Ib.*
3. Under the revenue act of 1845 and the amendatory act of 1847, no title to land sold for taxes passes until a deed is executed by the register. The deed does not relate back to the sale. *Donohoe v. Veal*, 331.
4. The fourth section of the amendatory revenue act of March 12, 1849, only applies where the sale was made after its passage. *Ib.*
5. In the absence of any stipulation in a lease, the lessor is bound to pay taxes on the property, but not on improvements made by the lessee, which the latter is entitled to remove, or to be compensated for, at the expiration of the lease. *Leach v. Goode*, 501.

TIME.

1. Where letters of administration were granted January 12, 1852, a demand exhibited January 12, 1853, was held "within one year after the granting of the letters." *Kimm v. Osgood's Adm'r*, 60.

TRESPASS.

See INJUNCTION, 1.

1. An entry of public land gives no title to timber cut and lying upon the land at the time of entry. *Keeton v. Audsley*, 362.
2. A sheriff is responsible for all trespasses committed by a deputy by color of his office. *State v. Moore*, 369.
3. The securities in a sheriff's bond are liable for a trespass committed by the sheriff, in seizing property exempt from execution. *Ib.*
4. The statutory remedy for trespass on land does not supersede the common law remedy. So, a complaint before a justice, which would be insufficient under the statute, may yet be good for the common law action. *Tackett v. Huesman*, 525.

TROVER.

1. In an action for the conversion of a slave, the measure of damages is the value with interest. The plaintiff cannot recover the value of the hire by way of damages. *Polk's Adm'r v. Allen*, 467.
2. If a slave is gratuitously left with a party, no damages are recoverable until a demand. *Ib.*

TRUSTS.

See USES AND TRUSTS.

UNLAWFUL DETAINER.

See FORCIBLE ENTRY AND DETAINER, 1.

USES AND TRUSTS.

See PRACTICE, 17. PLEADING, 5.

USES AND TRUSTS—(Continued.)

1. A deed of bargain and sale, for a valuable consideration, in trust for the use of the wife of the bargainor during life, and her heirs in fee simple, raises a use in the bargainee, and the second use is not executed by the *statute of uses*, even though the consideration may have moved from her to whom it was limited. *Guest v. Farley*, 147.
2. A trustee cannot recover the trust property from a grantee of his *cestui que trust* while the estate of the latter continues. *Bowen v. Bower's Executor*, 399.
3. Any trustee having reasonable doubt as to the proper disposition of funds in his hands has a right, for his own safety, to apply to a court of equity for directions, making the persons interested parties to the proceeding. *Hayden's Ex'rs v. Marmaduke*, 403.
4. Where persons are made trustees for the payment of debts or legacies, the rights of the creditors or legatees will be bound by a judgment fairly obtained in a proceeding in which the trustees are parties, although the creditors or legatees are not before the court. *Miles v. Davis & Taylor*, 408.
5. A trust results to a father, who advances money to his son to enter land for him, with which the son enters the land in his own name. *Valle v. Bryan*, 423.
6. A resulting trust is an equitable estate which may be sold at administration sale. *Valle v. Bryan*, 423.
7. A. before his marriage, conveyed certain land to B., in fee, in trust to such use or uses, and to such person as A., in his life-time, should, by deed or will appoint, and in default of and until such appointment, to the use of A. and his heirs in fee. A., by his last will, devised all his real estate to his children by a former marriage. *Held*, A.'s widow was entitled to dower in the land first named, his will being regarded as a devise of his interest, and not as an execution of the power of appointment. *Link v. Edmondson*, 487.

USURY.

1. In an action on a note made in another state, the burden of proof is on the defendant to show that the rate of interest on the face of the note is usurious. *Davis v. Bowling & Ely*, 651.

VARIANCE.

See PLEADING, 1, 21.

VENDOR AND VENDEE.

See SALES. LIEN.

VERDICT.

See PRACTICE AND PROCEEDINGS IN CRIMINAL CASES, 9.

VERDICT—(*Continued.*)

1. A verdict in a criminal case which incorrectly states the name of the party indicted, will not support a judgment. *State v. McBride*, 239.
2. Such a mistake cannot be amended after the separation of the jury. *Ib.*

WARRANT.

See COUNTIES, 2.

WARRANTY.

1. A bill of sale stated that B. had sold to S. "a negro woman named Lucy, for a slave during life, aged forty-one or forty-two years, *stout and healthy.*" *Held*, the words "stout and healthy" constituted a warranty of soundness. *Steel v. Brown*, 312.

WILL.

See ELECTION, 1. DOWER, 1, 3. USES AND TRUSTS, 7.

1. A will contained this clause: "I give and bequeath to my daughter, M. J., two negro girls, (naming them,) and after the death of my wife, my said daughter, M. J., to have \$800 worth of property." The residuary clause was as follows: "All the rest and residue of my personal estate whatsoever and wheresoever, of what kind and quality soever the same may be, and not herein before given and disposed of, after the payment of my debts, legacies and funeral expenses, I give and bequeath to my wife, A. P., her executors, administrators and assigns, to and for their own use and benefit absolutely." The executors, after having paid the debts and specific legacies, had in their hands, undisposed of, property more than sufficient to pay the \$800 to M. J., which they delivered over to the widow of the testator. *Held*, this discharged the executors from all liability to M. J., it being the intention of the testator that the property *in specie* should be enjoyed by the widow during her life. But the property, in the hands of the widow, and of those purchasing from her with notice, if not without notice, was liable to the payment of the \$800 legacy. As against M. J. each and every portion of the property in the hands of purchasers was charged with the whole amount of her legacy, if it was worth so much, although, as between different purchasers, contribution might be enforced. *Austin v. Watts & Hughes*, 293.
2. A case in which the declarations of a testator were held inadmissible to explain the meaning of his will. *Gregory v. Cowgill*, 415.
3. Where a life estate is expressly given by a will, the same will not be converted into a fee by mere words of implication, unless the manifest general intent of the testator requires it. *Ib.*
4. In a proceeding to set aside a will, it is erroneous to arrest a judgment as to some of the defendants, and enter a final judgment against the others. *Rush v. Rush*, 441.

WILL—(Continued.)

5. Under the fourth section of the act concerning wills, (R. C. 1845,) a mark is a sufficient signing by the testator, notwithstanding he was able to write. *St. Louis Hospital Association v. Williams' Adm'r*, 609.
6. But if, in addition to the mark, the testator's name is signed to the will by another, *at his request*, the will is void, unless the person who writes the testator's name signs his own name as a witness, and states that he subscribed the testator's name, at his request, as required by the fifth section of the act. (*McGee v. Porter*, 14 Mo. Rep. 611, affirmed.) *Ib.*
7. A devise to a corporation will not be avoided by an immaterial variation in the name. *Ib.*

WRIT.

See BOATS AND VESSELS, 1, 2, 3, 4, 5.

WRIT OF ERROR.

See APPEAL.

WITNESS.

See EVIDENCE, 1, 2, 3, 4. DEPOSITION.